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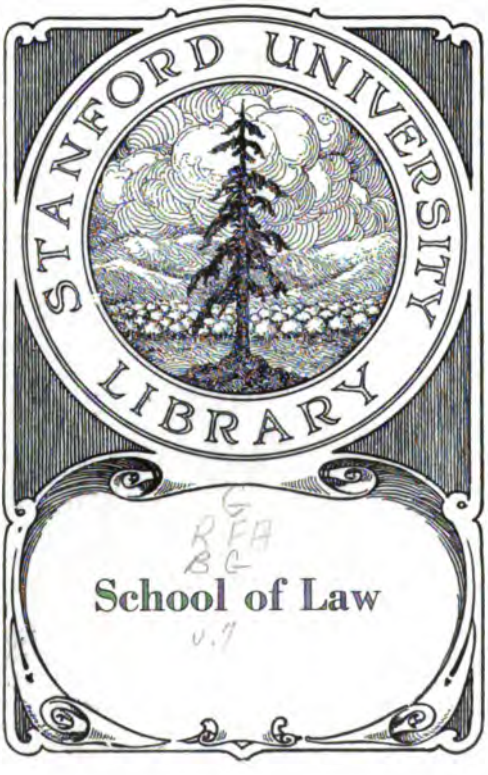

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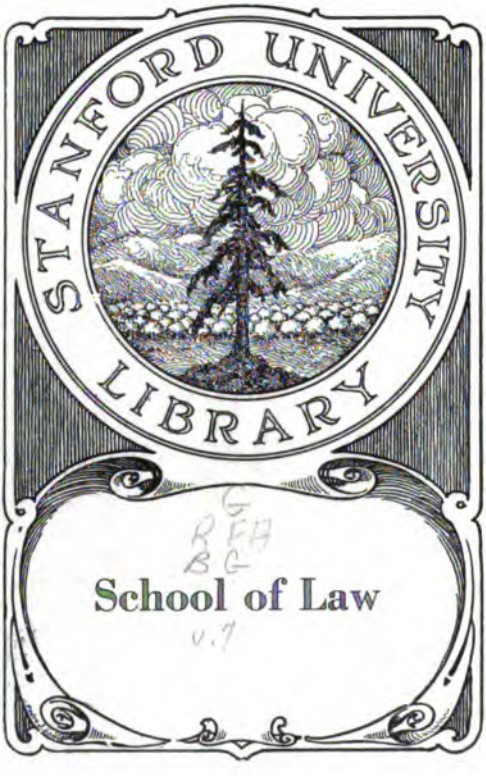

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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1868.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. VII.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. SALMON PORTLAND CHASE.

ASSOCIATES.

HON. SAMUEL NELSON,
HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. ROBERT COOPER GRIER,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. STEPHEN J. FIELD.

ATTORNEYS-GENERAL.

HON. WILLIAM M. EVARTS.
HON. EBENEZER ROCKWELL HOAR.
[Appointed March 5th, 1869.]

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE JANUARY 15, 1869, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.	FOURTH.	1864.
HON. S. P. CHASE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	December 6th. PRESIDENT LINCOLN.
ASSOCIATES.	SECOND.	1845.
HON. SAML. NELSON, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	February 14th. PRESIDENT TYLER.
	THIRD.	1846.
HON. R. C. GRIER, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	August 4th. PRESIDENT POLK.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	FIFTH.	1862.
HON. N. H. SWAYNE, Ohio.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	January 24th. PRESIDENT LINCOLN.
"	SIXTH.	"
	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, AND ARKANSAS.	July 16th. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

GENERAL RULE,

MADE AT DECEMBER TERM, 1868.

Rule No. 54—Admiralty.

Whenever a cross-libel is filed upon any counter claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages as claimed in said cross-libel, unless the court on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1868.

GIRARD *v.* PHILADELPHIA.

1. Where a testator devises the income of property in trust primarily for one object, and if the income is greater than that object needs, the surplus to others (secondary ones), a bill in the nature of a bill *quia timet*, and in anticipation of an incapacity in the trusts to be executed hereafter, and when a surplus arises (there being no surplus now, nor the prospect of any), will not lie by heirs at law (supposing them otherwise entitled, which here they were decided not to be), to have this surplus appropriated to them on the ground of the secondary trusts having, subsequently to the testator's death, become incapable of execution.
2. Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name, an enlargement of its area, or an increase in the number of its corporators. And these are changes which the legislature has power to make.
3. Under the will of Stephen Girard (for the terms of which see the case *infra*), the whole final residuary of his estate was left to the old city of Philadelphia in trust, to apply the income;

   i. For the maintenance and improvement of his college as a primary object, and after that—

   ii. To improve its police;

   iii. To improve the city property and the general appearance of the city, and to diminish the burden of taxation:

   The court having declared that so long as any portion of the income should be found necessary for improvement and maintenance of the college, the second and third objects could claim nothing, and the whole income being, in fact, necessary for the college,

   Held—i. That no question arose *at this time* as to whether the new

Statement of the case.

city should apply the surplus under the trusts for the secondary objects to the benefit of the new city, or to that portion of it alone embraced in the limits of the old one.

ii. That whether or not, the trusts being, as was decided in *Vidal* v. *Girard* (2 Howard, 127), in themselves valid, Girard's heirs could not inquire or contest the right of the city corporation to take the property or to execute the trust; this right belonging to the State alone as *parens patriæ*.

APPEAL from the Circuit Court for the Eastern District of Pennsylvania; the case as presented by bill and answer being thus:

The city of Philadelphia, as originally laid out in 1683, and as incorporated in 1701, was situated upon a rectangular plot of ground, bounded in one direction by two streets called Vine and South, a mile apart, and in the other by two rivers (the Delaware and Schuylkill), two miles apart;—the corporate title of the city being "the Mayor, Aldermen, and Citizens of Philadelphia." Upon the neck of land above described the corporate city continued to be contained until 1854; the inhabitants outside or adjoining it being incorporated at different times, and as their numbers extended, into bodies politic, under different names, by the State legislature, and with the city, forming the county of Philadelphia. In 1798, the Revolution having dissolved the old corporation, the legislature incorporated the city with larger powers; and prior to 1854, nearly twenty acts had been passed altering that law, and forming, the whole of them, what was popularly called the charter of the city; but as already said, from 1683 to 1854, the city limits were the same.

In this state of things Stephen Girard, in 1831, after sundry bequests to his relatives and friends, and to certain specified charities, and after announcing that his great and favorite object was the establishment of a college for the education of poor orphans, and that, together with the object adverted to, he had sincerely at heart the welfare of the *city of Philadelphia*, and as a part of it, was desirous to improve the neighborhood of the river Delaware, so that the eastern part

of *the city* might be made better to correspond with the interior—left by will the real and personal residue of an estate of some millions of dollars, to "the Mayor, Aldermen and Citizens of Philadelphia," that is to say, to the city corporation above described, in trust, so far as regarded his real estate in Pennsylvania (this being the important part of his realty), that no part of it should ever be alienated, but should be let on lease, and that after repairing and improving it, the net residue should be applied to the same purposes as the residue of his personal estate, and that as regarded that, it should be held in trust as to $2,000,000, to expend it, or as much as might be necessary, in constructing and furnishing a college and out-buildings for the education and maintenance of not less than three hundred orphans. A lot near Philadelphia, of forty-five acres, was devoted for these structures, and the orphans might come from any part of Pennsylvania (orphans from the city of Philadelphia having a preference over others outside), or from the cities of New York or New Orleans.

After many and very special directions as to the college, followed by a bequest of $500,000 for a city purpose, the will proceeded:

"If the income arising from that part of the said sum of $2,000,000 remaining after the construction and furnishing of the college and out-buildings shall, owing to the increase of the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such *further* sum as may be necessary for the construction of new buildings, and the maintenance and education of such further number of orphans as can be maintained and instructed within such buildings, as the said square of ground shall be adequate to, shall be taken from the *final residuary fund* hereinafter expressly referred to for the purpose, *comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill Navigation Company;* my design and desire being that the benefits of said institution shall be extended to as great a number of orphans

as the limits of the said square and buildings therein can accommodate."

This final residuary fund was directed to be invested, and the income applied—

"1st. To the further improvement and maintenance of the aforesaid college [as directed in the last quoted paragraph].

"2d. To enable the city to improve its police.

"3d. To enable it to improve the city property, and the general appearance of the city itself, and in effect to diminish the burden of taxation, now most oppressive."

"To all which objects," the will proceeded, "the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year forever, *after providing for the college as hereinbefore directed as my primary object.*"

In conclusion, he directed that if the city should wilfully violate any of the conditions of his will, the remainder of his estate should go to the commonwealth of Pennsylvania for certain purposes, excepting, however, the income from his real estate in the city and county of Philadelphia, which it was to hold for the college; and if the commonwealth failed so to apply it, the remainder should go in the same way to the United States.

The above described city corporation, "the Mayor, Aldermen, and Citizens of Philadelphia," having accepted the trust, and built and furnished the college and out-buildings, administered the charity through its organs until 1854. By that time twenty-eight municipal corporations, making the residue of the county, had grown up around the old "city;" some near, some far off, some populous, some occupied yet by farms. They comprised "districts," boroughs, townships, were of various territorial extent, and differed in the details of their respective organizations. In the year named, the legislature of Pennsylvania passed what is known in Philadelphia as the Consolidation Act.

By this act the administration of all concerns of the twenty-nine corporations, including their debts, taxes, property, police, and whatever else pertained to municipal office, and also the government of the county itself, were consolidated into one. All the powers, rights, privileges, and immunities incident to a municipal corporation, and necessary for the proper government of the same, and those of "the Mayor, Aldermen, and Citizens of Philadelphia," and "all the powers, rights, privileges, and immunities, possessed and enjoyed by the other twenty-eight corporate bodies, which, with the old city, made up the county of Philadelphia;" and also "the board of police of the police district, the commissioners of the county of Philadelphia, the treasurer and auditor thereof, the county board, the commissioners of the sinking fund, and the supervisors of the township," were, by virtue of the process of consolidation, vested in "the city of Philadelphia, as established by this act." A police board was to fix the whole number of policemen "*for the service of the whole city.*" The "right, title, and interest," of the "several municipal corporations mentioned in this act, of, in, and to all the lands, tenements, and hereditaments, goods, chattels, moneys, effects, and of, in, and to all other property and estate whatsoever and wheresoever, belonging to any or either of them," were "vested in the city of Philadelphia," and all "estates and incomes held in trust by the county, *present city*, and each of the townships, districts, and other municipal corporations, united by this act," were "vested in the city of Philadelphia, *upon and for the same uses, trusts, limitations, charities, and* conditions, as the same are now held by the said corporations respectively." The act also declared that the new city corporation should be "vested with all the powers, rights, privileges, and immunities," of the old one. The "net debt of the county of Philadelphia, and the several net debts of the guardians for the relief and employment of the poor of the city of Philadelphia," and of the board of health, "and of the controllers of the public schools," and of such of the said twenty-nine municipalities, eighteen being enumerated, as

had contracted debts, were consolidated and formed into one debt, to be called the debt of the city of Philadelphia, in lieu of the present separate debts so consolidated. The consolidation was carried into full effect. The act provided that the corporators of the new city, having elected a mayor and councils, the councils should direct the mayor to appoint a day when "all the powers, rights, privileges, and immunities possessed and enjoyed" by the various corporations, and those also of the old city, should "cease and terminate;" and the councils did accordingly, by resolution, direct the mayor to "issue his proclamation forthwith dissolving the different corporations superseded by the act, to take effect on the 30th instant;" and in obedience thereto, the mayor, by public proclamation, dated the 24th June, 1854, proclaimed that "all the powers, rights, privileges, and immunities possessed and enjoyed" by the now late twenty-eight municipalities, and "by the present mayor and councilmen" of the city of Philadelphia, from the said 30th day of June, 1854, should "cease and terminate."

The old city covered about two square miles; the new one, which covered the whole old county of Philadelphia, about a hundred and twenty-nine. In point of population, however, the old city embraced a fourth or fifth part of all the inhabitants of the new one. In the popular branch of the new city legislature, composed of eighty-five members, the old city enjoyed twenty. In the higher branch it had six members, the residue having eighteen. The debt of the old city had been small, and its credit high. By the consolidation the debt became large.

By the Consolidation Act, it may be well to add, the councils of the city, in laying taxes, were required so to lay them as to show how much was laid for each object supported, respectively, and this exhibition was required by the act to be printed on the tax-bills furnished to the tax-payers, as thus:

"For the relief of the poor, 15 cents in the $100 of the assessed value of said property.

"For public schools, 28 cents in the $100 of the assessed value of said property.

"For lighting the city, 9 cents in the $100 of the assessed value of said property.

"For loan tax, 75 cents in the $100 of the assessed value of said property.

"*For expenses of police, 22 cents in the $100 of the assessed value of said property, &c., &c., &c.*"

In the erection and furnishing of the college and outbuildings, the whole fund of $2,000,000 was exhausted, and the whole income of the final residuary fund was now habitually drawn upon for the maintenance and education of the orphans, numbering, at the time when the bill was filed, about three hundred and thirty, and limited to this number, because the income from even the residuary fund was inadequate to the maintenance and education of a greater number. However, a part of Girard's estate consisted of coal lands in Pennsylvania, not yet ripe for being worked, whose value was largely increasing, and from which, when it should be found expedient to work them, the revenue would, perhaps, be very great.

In this state of things certain heirs of Girard filed their bill in the court below, praying an account; and that a master might be appointed to inquire into the gross value, and then present capacity for annual yield of the coal lands, and if such an inquiry showed a capacity for affording income "immensely" beyond all the wants of the college, and all proper charges on the estate, that then, if the court should be of opinion that the whole residuary estate was applicable to the college (a matter denied by the bill), that it would decree "such surplus, found to exist beyond and beside all possible and lawful wants of the college," &c., to the complainants.

The court below dismissed the bill, which action of it was the ground of the appeal.

Mr. C. Ingersoll, for the heirs, admitting that the validity of the trusts of Girard's will had been settled by this court

in *Vidal* v. *Girard*,* and stating that the present case turned upon the supposed intention of the testator, contended:

1. That the final residuary fund, applicable to the support of the college, was only that described as "my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill Navigation Company," and that of the coal lands, and other remaining property, Girard had died intestate.

2. That if this were not so, yet, that with the complete annihilation of the old city corporation, and its absorption or merger into the immense body politic created by the Consolidation Act, the whole object of the testator, beyond the college, fell to the ground; that

(i.) The new city became incompetent to act as a trustee, and

(ii.) That if it still were competent, the trusts themselves, beyond the college, were now incapable of execution.

The old city—"the city"—was, after the college, the sole object of Girard's bounty. The suburbs were absolutely excluded from it. He wished to improve, finish, and adorn municipal work already far advanced; an object practicable when the city was but two miles square, and mostly built on; impracticable when an immense county—with swamps to be drained, hills to be levelled, and valleys to be raised; farm land largely, a suburb sempiternal—was converted by name, but not in fact, into a city. The whole city legislature was changed. To disunite the control from the beneficial interest, and give the command to those who are not citizens, is to violate the will. Yet those who, by the will, would now have the control of the Girard estates, were a feeble minority, incapable of protecting it against those who had an interest immediately opposed to its going to the limited space which the testator designed, and an interest directly in favor of appropriating it to themselves. The devise was to municipal discretion; the discretion of the late city; a discretion controllable by its own citizens. The

* 2 Howard, 127.

testator having excluded all parts but that known to him as the city, the new city could not hold the estates for itself; that is to say, for the region of the twenty-nine municipalities, twenty-eight of which were not devised to, but excluded from devise. Having had a right, as he had, to devise as he did, to one municipality exclusively of the others, no legislature could make over his property to the excluded districts, contrary to his will. Conceding that perhaps the franchises of the old city might have been extended over more territory, and its capacities enlarged, yet the annexation of twenty-eight municipalities, and the addition of sixty-four times more territory, with room for sixty-four times more population, and the consolidation and merger of them with the city, and a complete *fusion and recast of the whole*— this was a different thing. The old city had, moreover, been, in form, dissolved; and, if it had not been, yet the body now pretending to be the devisee, was a body unknown to the testator; one composed of elements foreign to his devise; in fact, not his devisee. The devise had so lapsed. The new city was thus unfit and incapable of being trustee, even if the trusts, after and beyond the college, were longer capable of being executed. But

2. These trusts could not now, either administratively or arithmetically, be executed.

In *Soohan* v. *The City*,* decided after the Consolidation Act, it was held that orphans, born in the limits of the old city, were entitled to the same preference as they had previously enjoyed; in other words, that orphans born beyond the limits of the old city were not, in the sense of the will, orphans born in the city; in fact, that the old city and new city were not the same thing. How was the *police* of the old city since the consolidation to be improved? In the first place the old city no longer existed. Moreover, the testator could not endow one part of the police; for the force is not divided into parts. There is no police for the old city apart from the remaining region which with it makes the new

* 33 Pennsylvania State, 9.

city. The police is one. The policemen are by the terms of the act to be "for the whole city." It spreads undivided, and everywhere alike.

Or how apply the income, easily applied to beautify the ancient city, to improve the "general appearance" of a region a hundred and twenty-nine miles square, far the larger part of which was no city, but on the contrary, farms?

Or how apply it to diminish taxation in the old city, taxes being of necessity now laid uniformly throughout the whole vastly greater region alike?

The doctrine of *cy-pres*, illustrated in Richard Baxter's well-known case,* was inapplicable to our States, where there was no established religion, and did not help the matter. The surplus income beyond the wants of the college thus went, the learned counsel contended, to the heirs.

Messrs. Meredith and Olmstead, contra:

1. The college is the object to which all others are subservient. And if the trusts for municipal purposes cannot be executed by any one, then the whole trust estate must be applied for the purposes of the college.† Public trusts and charitable trusts may be considered as synonymous.‡

2. The trust for municipal purposes was to have effect only if there was a surplus beyond the wants of the college. There is no such surplus. There can be, therefore, no question *now*. And with forty-five acres of ground to be covered by college buildings, and the whole State of Pennsylvania with the cities of New York and New Orleans as a field from which to bring fatherless children, it is not likely that any surplus will ever arise. Coal dug from coal lands is not income from those lands. It is the land itself. When the coal is exhausted, as by mining it will be, the land has little

* 1 Vernon, 248.

† Case of Thetford School, 8 Reports, 131; Pickering *v.* Shotwell, 10 Pennsylvania State, 23; McLain *v.* School Directors, 51 Id. 196; City *v.* Girard's Heirs, 45 Id. 28.

‡ Cresson's Appeal, 30 Pennsylvania State, 450; Magill *v.* Brown, Brightley, 350; Attorney General *v.* Aspinwall, 2 Mylne & Craig, 622.

value. The proceeds of the coal must be invested as capital, and income from it alone used.

5. The Consolidation Act by express terms declared that trusts held by any of the old corporations should remain inviolate in the new. Independently of which, the change of name or enlargement of franchises does not destroy the identity of a municipal corporation.*

4. The devise for municipal purposes—if it be a devise in trust and not a gift to the mayor, aldermen, &c., absolutely (in which latter case clearly the heirs have no right to an account)—can be executed if ever a surplus shall exist. Our answer to the bill illustrates some of the modes. It says:

"The defendants can apply such surplus to the cost of maintaining the police in that part of the new city which formerly made the old one, and reduce the rate of taxation for the support of the police, on the property situated within these limits, to the difference between the sum applicable from the residuary for that purpose, and the sum assessed on property outside of the said limits; and if the sum applicable from the said residuary for the expenses of the police, will amount to the whole sum necessary for such expenses within the said limits, they may levy no tax upon property within the said limits for such expenses. If such surplus will exceed the amount needed for the police expenses within the said limits, they will be enabled to improve the corporate property within the said limits, or apply it to improve the appearance of that portion of the city without resort to taxation for that purpose. And if it will be within the terms of the trust to disregard the specific objects mentioned, then they may and can pay such surplus, beyond that which is needed for the necessities of the college, directly into the city treasury in aid of the tax fund, and levy and assess upon the property within the said limits a sum less the amount so paid in aid of that fund."†

5. If the trust for municipal purposes has been forfeited by the acts of the trustees, then by the terms of the will,

* Luttrel's Case, 4 Reports, 88; Haddock's Case, Sir T. Raymond, 439.; S. C. 1 Ventris, 355.

† See Kirby v. Shaw, 19 Pennsylvania State, 258.

it is forfeited to the commonwealth. But if it cannot be executed, and if the college is not entitled to take the income, who is entitled to the funds? The commonwealth, as *parens patriæ*. If the devise had been to A. and his heirs, and A. had died without heirs, the estate would not go to the heirs of the testator, but would escheat. There is no reason why, in the case of a devise in trust for a charity, which has vested and taken effect and fails, a different rule should exist.*

Mr. Justice GRIER delivered the opinion of the court, and after observing that the attempt to restrain the alienation of the realty, being inoperative, could not affect the validity of the devise, and that the income of the whole residuary was devoted to the three objects stated by the testator, the college being the "primary object," and that so long as any portion of this residuary fund should be found necessary for "*its* improvement and maintenance," on the plan and to the extent declared in the will, the second and third objects could claim nothing—proceeded as follows:

The bill admits this to be a valid charity, and claims only the residue after that is satisfied. Now, it is admitted (for it has been so decided),† that till February, 1854, the corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, subject to these charitable trusts, and consequently, at that date, his heirs at law had no right, title, or interest whatsoever in the same. But the bill alleges that the act of the legislature of that date (commonly called the "Consolidation Act"), which purports to be a supplement to the original act incorporating the city, has either dissolved or destroyed the identity of the original corporation, and it is consequently unable any longer to administer the trust. Now, if this were true, the only

* Attorney-General v. Ironmongers' Company, 2 Bevan, 813; Magill v. Brown, Brightly, 395; Fountain v. Ravenal, 17 Howard, 369; Guardians of the Poor v. Green, 5 Binney, 558; Cresson's Appeal, 30 Pennsylvania State, 150.

† Vidal v. Girard, 2 Howard, 127.

consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee.

It is not insisted that the mere change or abbreviation of the name has destroyed the identity of the corporation. The bill even admits that a small addition to its territory and jurisdiction might not have that effect, but that the annexation of twenty-nine boroughs and townships has smothered it to death, or rendered it utterly incapable of administering trusts or charities committed to it when its boundaries were Vine and South Streets, and the two rivers. There is nothing to be found in the letter or spirit of this act which shows any intention in the legislature to destroy the original corporation, either by changing its name, enlarging its territory, or increasing the number of its corporators. On the contrary, "all its powers, rights, privileges and immunities, &c., are continued in full vigor and effect." It provides, also, that "all the estates, &c.," held by any of the corporations united by the act, shall be held "upon and for the same uses, trusts, limitations, charities, and conditions, as the same were then held."

By the act of 4th of April, 1852, the corporation was "authorized to exercise all such jurisdiction, to enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in said will." It may also "provide, by ordinance or otherwise, for the election and appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard."

Now, it cannot be pretended that the legislature had not the power to appoint another trustee if the act had dissolved the corporation, or to continue the rights, duties, trusts, &c., in the enlarged corporation. It has done so, and has given the widest powers to the trustee to administer the trusts and charities, according to the intent of the testator, as declared in his will.

The legislature may alter, modify, or even annul the franchises of a public municipal corporation, although it may not impose burdens on it without its consent. In this case the corporation has assented to accept the changes, assume the burdens, and perform the duties imposed upon it; and it is difficult to conceive how they can have forfeited their right to the charities which the law makes it their duty to administer. The objects of the testator's charity remain the same, while the city, large or small, exists; the trust is an existing and valid one, the trustee is vested by law with the estate, and the fullest power and authority to execute the trust.

Whatever the fears or fancy of the complainants may be, as to the moral ability of this overgrown corporation, there is no necessary or natural inability which prohibits it from administering this charity as faithfully as it could before its increase. In fact, it is a matter in which the complainants have no concern whatever, or any right to intervene. If the trust be not rightly administered, the *cestui que trust*, or the sovereign may require the courts to compel a proper execution.

In the case of Vidal,* the Supreme Court say, that "if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, or any other private person, would have any right to inquire into or contest the right of the corporation to take the property or execute the trust; this would exclusively belong to the State in its sovereign capacity, and as *parens patriæ*, and its sole discretion."

This is not an assertion that the legislature, as *parens patriæ*, may interfere, by retrospective acts, to exercise the *cy-pres* power, which has become so odious from its application in England to what were called superstitious uses. Baxter's case, and other similar ones, cannot be precedents where there is no established church which treats all dissent as superstition. But it cannot admit of a doubt that, where there is a valid devise to a corporation, in trust for chari-

* 2 Howard, 191.

table purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator, if the corporation be dissolved, or, if not, by modifying or enlarging its franchises, provided the trust be not perverted, and no wrong done to the beneficiaries. Where the trustee is a corporation, no modification of its franchises, or change in its name, while its identity remains, can affect its rights to hold property devised to it for any purpose. Nor can a valid vested estate, in trust, lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right, as well as the duty of the sovereign, by its courts and public officers, as also by legislation (if needed), to have the charities properly administered.

Now, there is no complaint here that the charity, so far as regards the primary and great object of the testator, is not properly administered; and it does not appear that there *now* is, or ever will be, any residue to apply to the secondary objects. If that time should ever arrive, the question, whether the charity shall be so applied as to have the "effect to diminish the burden of taxation" on all the corporation, or only those within the former boundaries of the city, will have to be decided. The case of *Soohan* v. *The City*, does not decide it; nor is this court bound to decide it. The answer shows how it may be done, and the corporation has ample power conferred on it to execute the trust according to either hypothesis; and, if further powers were necessary, the legislature, executing the sovereign power, can certainly grant them. In the meantime the heirs at law of the testator have no concern in the matter, or any right to interfere by a bill *quia timet*. Their anticipations of the future perversion of the charity by the corruption or folly of the enlarged corporation, and the moral impossibility of its just administration, are not sufficient reasons for the interference of this court to seize upon the fund, or any part of it, and to deliver it up to the complainants, who never had, and by

the will of Stephen Girard, were not intended to have any right, title, or claim whatsoever to the property.

In fine, the bill was rightly dismissed, because:

1st. The residue of the estate of Stephen Girard, at the time of his death, was, by his will, vested in the corporation on valid legal trusts, which it was fully competent to execute.

2d. By the supplement to the act incorporating the city (commonly called the "Consolidation Act"), the identity of the corporation is not destroyed; nor can the change in its name, the enlargement of its area, or increase in the number of its corporators, affect its title to property held at the time of such change.

3d. The corporation, under its amended charter, has every capacity to hold, and every power and authority necessary to execute the trusts of the will.

4th. That the difficulties anticipated by the bill, as to the execution of the secondary trusts, are imaginary. They have not arisen, and most probably never will.

5th. And if they should, it is a matter, whether probable or improbable, with which the complainants have no concern, and cannot have on any possible contingency.

DECREE AFFIRMED WITH COSTS.

THE BANKS v. THE MAYOR.

1. Where an act of a State legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on Federal securities made by the Constitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion of the securities for the tax on which the bank claimed reimbursement, was, in law, not exempt, and the highest court of the State sanctioned this refusal: *Held*, that this was a decision by a State court against a right, privilege, or immunity claimed under the Constitution or a statute of the United States, and so that this court had jurisdiction under the 25th section of the Judiciary Act, and the amendatory act of February 5th, 1867.
2. Certificates of indebtedness issued by the United States to creditors of the

Statement of the case.

government, for supplies furnished to it in carrying on the recent war for the integrity of the Union, and by which the government promised to pay the sums of money specified in them, with interest, at a time named, are beyond the taxing power of the States.

THESE were three cases in error to the Court of Appeals of New York, in which the people of that State, at the relation of different banks there, were plaintiffs in error, and the mayor and controller of the city of New York were defendants. Each presented, under somewhat different forms, the same question, namely: "Are the obligations of the United States, known as certificates of indebtedness, liable to be taxed by State legislation?"

The certificates referred to were issued under authority of Congress, empowering the Secretary of the Treasury to issue them to any public creditor who might be desirous of receiving them. They were payable in one year or earlier, at the option of the government, and bore six per cent. interest. In the present cases, they had been issued to creditors for supplies necessary to carrying on the war for the suppression of the late rebellion.

The three cases were argued and considered together. The more immediate case in each was thus: In 1863 and in 1864, the proper officers of the State, acting under the laws of New York, assessed certain taxes upon the capital stock of the several banking associations in that State. Some of these banking associations resisted the collection of the tax on the ground that, though nominally imposed upon their respective capitals, it was, in fact, imposed upon the bonds and obligations of the United States, in which a large proportion of these capitals was invested, and which, under the Constitution and laws of the United States, were exempt from State taxation.

This question was brought before the Court of Appeals, which sustained the assessments, and disallowed the claim of the banking associations.

From this decision an appeal was taken to this court, upon the hearing of which, at the December Term, 1864, it was adjudged that the taxes imposed upon the capitals of the as-

sociations were a tax upon the national bonds and obligations in which they were invested, and, therefore, so far, contrary to the Constitution of the United States.*

A mandate in conformity with this decision was sent to the Court of Appeals of New York, which court thereupon reversed its judgment, and entered a judgment agreeably to the mandate.

Afterwards, on the 30th of April, 1866, the legislature of New York provided by law for refunding to the banking associations, and other corporations in like condition, the taxes of 1863 and 1864, collected upon that part of their capitals invested in securities of the United States exempt by law from taxation. The board of supervisors of the county of New York was charged with the duty of auditing and allowing, with the approval of the mayor of the city and the corporation counsel, the amount collected from each corporation for taxes on the exempt portion of its capital, together with costs, damages, and interest. Upon such auditing and allowance, the sums awarded were to be paid to the corporations severally entitled, by the issue to each of New York County seven per cent. bonds of equal amounts. These bonds were to be signed by the controller of the city of New York, countersigned by the mayor, and sealed with the seal of the board of supervisors, and attested by the clerk of the board.

Under this act the board of supervisors audited, and allowed to the several institutions represented in the three cases under consideration, their several claims for taxes collected upon the national securities held by them, including in this allowance the taxes paid on certificates of indebtedness, which the corporations asserted to be securities of the United States exempt from taxation. But the controller, mayor, and clerk refused to sign, countersign, seal, and attest the requisite amount of bonds for payment, insisting that certificates of indebtedness were not exempt from taxation. A writ of mandamus was thereupon sued out of the

* Bank Tax Case, 2 Wallace, 200.

Supreme Court of New York, for the purpose of compelling these officers to perform their alleged duties in this respect. An answer was filed, and the court by its judgment sustained the refusal. An appeal was taken to the Court of Appeals of New York, by which the judgment of the Supreme Court was affirmed. Writs of error, under the 25th section of the Judiciary Act, brought these judgments here for revision; the section* which gives such writ, where is drawn in question the validity of a statute of, or authority exercised under any State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution or statute of the United States, and the decision is against the title, right, privilege, or exemption specially set up, &c.;—a paragraph, this last, re-enacted by act of February 5th, 1867,† with additional words, as "where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up, &c."

Messrs. O'Connor and O'Gorman in support of the judgment below:

1. The judgment below is not subject to review here. The banks having voluntarily paid the tax, had no right to recover it, even in a regular action at law or suit in equity. There was no color of a claim enforceable by mandamus, except such as might have arisen under the State act of April 30th, 1866. The reimbursement contemplated by that act was a favor to a certain class of claimants upon its liberality. By the voluntary payment, the banks waived any exemption that might have existed. When they appeared in the State court they had no title, right, or privilege, save such as may have been conferred by the State act. The construction, import, and effect of the Constitution and laws of

* 1 Stat. at Large, 85. † 14 Id. 384.

the United States in respect to taxation by States, were only incidentally brought under consideration in the State court; not immediately "drawn in question," within the meaning of the Judiciary Act.

2. The exemption set up on the other side, can rest only upon the power of Congress "to borrow money on the credit of the United States." The organs whereby the Federal government carries on its operations are, we admit, exempt. But a certificate or statement of a *past indebtedness* —a mere *chose*—property in the hands of a citizen—is not a necessary instrumentality of the government. There is no particular virtue in the certificate. It affords ready proof of the debt, but does not alter its character.

Is, then, issuing a certificate acknowledging a *pre-existing* debt, *arising from the purchase of supplies or procuring of service*, "borrowing money?" According to ordinary understanding it certainly is not. The term in use at the time, which would have come nearest to a description of these certificates, is "bills of credit." With these the Convention was familiar, and prohibited their issue by the States. It did not confer upon Congress power to issue them. The modes of raising means to support the government are pointed out by the Constitution. First, taxes, &c. Secondly, borrowing money. Buying on credit is not sanctioned, and was not necessary to be sanctioned. The other means were adequate so long as there was money at home or credit abroad. If the relators cannot stand upon an implication from the principles of the Constitution they must fail.

Messrs. Peckham and Burrill, with whom was Rodman, contra, submitting that the jurisdiction of this court was sufficiently plain, and reiterating, enlarging, and enforcing the arguments made in recent previous cases denying the right of States to tax Federal securities held by banks,* contended that the *credit* of the United States, independently of the form

* Bank of Commerce v. New York City, 2 Black, 620; Bank Tax Case, 2 Wallace, 200; Van Allen v. The Assessors, 3 Id. 573.

in which it is used, was the matter meant to be protected, and that whatever securities or contracts were issued upon that credit were exempt from State taxation.

The certificates were given to creditors having *debts due;* such as the creditors were entitled to have paid. Suppose them to be paid, and the creditors then immediately to lend the money to the United States on these certificates of indebtedness; that would confessedly be a loan, and not taxable. Now the certificates are issued simply to avoid this roundabout operation, and to creditors desirous of receiving them. They extend the time of payment and bear interest. Without them the debt would be payable immediately and without interest. It is thus, in substance, a *new contract* and a loan.

The government does not want money itself, but commodities and the services of men. It borrows only because it is easier to use the medium of exchange in its transactions than it is directly to secure commodities, services, &c., in kind. In essence, a borrowing of money and a purchase of commodities on credit are the same thing. Now, cases decide that the government's contract for the loan of money, or for the services of men, is exempt. Can any reason be shown why a contract for the purchase of commodities with an issue of a certificate of debt for them, should not be in the same position? The object in each case is the same, and the obstacles to the completion of the transaction desired by the government would be as detrimental to the public interest in one case as in the other.

In all registered loans of the government, the certificates of stock are in the form of certificates of indebtedness; that is to say, they import that the United States are indebted to the persons therein named in a sum therein expressed, which is to be paid at a specified time and place, with a specified rate of interest.

Some, indeed, are called by one name and some by another; but the different securities are so styled for convenience only, and not because of any difference in the essence of the obligation. They are all "securities" of the

United States; or, as Mr. Justice Bouvier defines that term,* "instruments which render certain the performance of a contract."

The CHIEF JUSTICE delivered the opinion of the court in all the cases.

The first question to be considered is one of jurisdiction. It is insisted, in behalf of the defendants in error, that the judgment of the New York Court of Appeals is not subject to review in this court.

But is it not plain, that under the act of the legislature of New York the banking associations were entitled to reimbursement by bonds of the taxes illegally collected from them in 1863 and 1864?

No objection was made in the State court to the process by which the associations sought to enforce the issue of the bonds to which they asserted their right. Mandamus to the officers charged with the execution of the State law seems to have been regarded on all hands as the appropriate remedy.

But it was objected on the part of those officers, that the particular description of obligations, of the tax on which the associations claimed reimbursement, were not exempt from taxation. The associations, on the other hand, insisted that these obligations were exempt under the Constitution and laws of the United States. If they were so exempt, the associations were entitled to the relief which they sought. The judgment of the Court of Appeals denied the relief upon the ground that certificates of indebtedness were not entitled to exemption. Is it not clear that, in the case before the State court, a right, privilege, or immunity was claimed under the Constitution or a statute of the United States, and that the decision was against the right, privilege, or immunity claimed? And, therefore, that the jurisdiction of this court to review that decision is within the express words of the amendatory act of February 5th, 1867? There

* Law Dictionary, title "Security."

can be but one answer to this question. We can find no ground for doubt on the point of jurisdiction.

The general question upon the merits is this:

Were the obligations of the United States, known as certificates of indebtedness, liable to State taxation?

If this question can be affirmatively answered, the judgments of the Court of Appeals must be affirmed; if not, they must be reversed.

Evidences of the indebtedness of the United States, held by individuals or corporations, and sometimes called stock or stocks, but recently better known as bonds or obligations, have uniformly been held by this court not to be liable to taxation under State legislation.

The authority to borrow money on the credit of the United States is, in the enumeration of the powers expressly granted by the Constitution, second in place, and only second in importance to the authority to lay and collect taxes. Both are given as means to the exercise of the functions of government under the Constitution; and both, if neither had been expressly conferred, would be necessarily implied from other powers. For no one will assert that without them the great powers—mentioning no others—to raise and support armies, to provide and maintain a navy, and to carry on war, could be exercised at all; or, if at all, with adequate efficiency.

And no one affirms that the power of the government to borrow, or the action of the government in borrowing, is subject to taxation by the States.

There are those, however, who assert that, although the States cannot tax the exercise of the powers of the government, as for example in the conveyance of the mails, the transportation of troops, or the borrowing of money, they may tax the indebtedness of the government when it assumes the form of obligations held by individuals, and so becomes in a certain sense private property.

This court, however, has constantly held otherwise.

Forty years ago, in the case of *Weston* v. *The City of Charles-*

ton, this court, speaking through Chief Justice Marshall, said:*

"The American people have conferred the power of borrowing money upon their government, and by making that government supreme have shielded its action in the exercise of that power from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised."

And applying these principles the court proceeded to say:

"The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of the government. It may be carried to an extent which shall arrest them entirely."

And finally:

"A tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently repugnant to the Constitution."

Nothing need be added to this, except that in no case decided since have these propositions been retracted or qualified. The last cases in which the power of the States to tax the obligations of the government came directly in question were those of the *Bank of Commerce* v. *The City of New York*,† in 1862, and the *Bank Tax Case*,‡ in 1865, in both of which the power was denied.

An attempt was made at the bar to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince us that such a distinction can be main-

* 2 Peters, 467. † 2 Black, 628. ‡ 2 Wallace, 200.

tained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money.

The principle of exemption is, that the States cannot control the national government within the sphere of its constitutional powers—for there it is supreme—and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control.

The certificates of indebtedness, in the case before us, are completely within the protection of this principle. For the public history of the country and the acts of Congress show that they were issued to creditors for supplies necessary to the government in carrying on the recent war for the integrity of the Union and the preservation of our republican institutions. They were received instead of money at a time when full money payment for supplies was impossible, and according to the principles of the cases to which we have referred, are as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued.

It results that the several judgments of the Court of Appeals must be

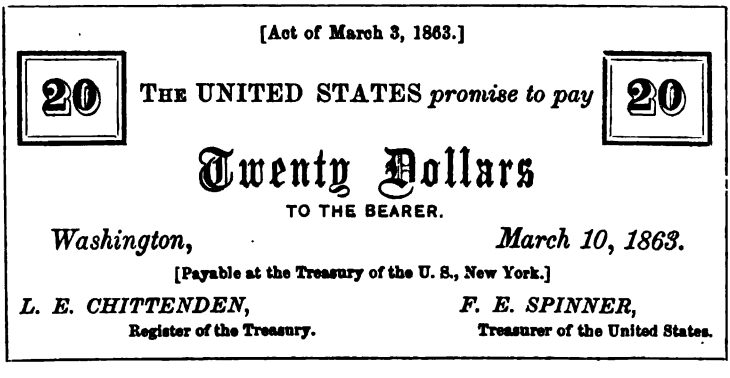
REVERSED.

NOTE.—At the same time with the cases just disposed of was decided another, from the same court, involving the same question of the right to tax as they did, but differing from them in certain respects. It is here reported:

BANK *v.* SUPERVISORS.

1. United States notes issued under the Loan and Currency Acts of 1862 and 1863, intended to circulate as money, and actually constituting, with the National bank notes, the ordinary circulating medium of the country, are, moreover, obligations of the National government, and exempt from State taxation.
2. United States notes are engagements to pay dollars; and the dollars intended are coined dollars of the United States.

THIS case—brought here by the Bank of New York—differed from the preceding in two particulars: (1) That the board of supervisors, which in the other cases allowed and audited the claims of the banking associations, refused to allow the claim made in this case; and (2) That the exemption from State taxation claimed in this case, was of United States notes, declared by act of Congress to be a legal tender for all debts, public and private, except duties on imports and interest on the public debt, while in the other cases it was of certificates of indebtedness. These United States notes, as is sufficiently known at the present, had become part of the currency of the country. Their form (with certain necessary variations for different denominations, place of payment, &c.) was thus:


[Act of March 3, 1863.]

20 THE UNITED STATES *promise to pay* 20

Twenty Dollars

TO THE BEARER.

Washington, *March 10, 1863.*

[Payable at the Treasury of the U. S., New York.]

L. E. CHITTENDEN, Register of the Treasury.

F. E. SPINNER, Treasurer of the United States.

Argument in favor of the tax.

The mandamus in the State court was directed, in the case now before the court, to the board of supervisors, instead of to the officers authorized to issue bonds, as in the cases just preceding.

The judgment in the Court of Appeals sustained the action of the board refusing to allow the exemption set up, and the case was brought here by writ of error to that court.

Messrs. O'Connor and O'Gorman, in support of the judgment below:

1. The exemption of the public debt of the United States from taxation by State authority, rests only upon that clause of the Constitution which authorizes Congress "to borrow money on the credit of the United States."

2. The purpose and effect of the acts authorizing the notes in question was to create a new kind of money in the United States—paper money—which was to be a substitute for a metallic currency. The issuing of these notes was neither more nor less than the creation, by right or without it, of a conventional money. The notes were intended to be money, and in practice have become the *only lawful money* in use.

3. The government did not, really and in fact, contract by these notes to pay the bearer on demand or at any time. The notes were made by the act a legal tender in payment of *all* debts, including (with a small exemption) the government's own, and of course when presented for payment, similar notes being a legal tender in discharge of them, the debt would be discharged by a delivery of new notes of the same kind. The notes were promises to make other promises, to be renewed *ad infinitum*. There is really no debtor nor creditor in respect of them. There is no loan or evidence of loan.

As far as the credit of the United States was involved in the issue of these notes, no greater responsibility was assumed than is assumed by any government in coining or otherwise affixing a stamp to metal, and affixing to it a certain nominal value; although by mixing or debasing the metal, its *real* value, in use or exchange, may have been totally destroyed. The acts in question did but endeavor to confer a prescribed value on certain stamped paper, which they compelled the citizens of the United States to take in payment of all debts due, or to become

due by the government to them, or by them to the government, or to one another.

By this means, instead of *borrowing money*, *Congress made money*, and rendered borrowing unnecessary.

The protection from State interference accorded by the Constitution to the exercise by the government of the power of borrowing cannot be invoked in such a case.

4. The acts of Congress relating to the financial operations of the government during the civil war, afford evidence that Congress did not intend that the notes in question should be exempt from State taxation.*

Messrs. Peckham and Burrill, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The general question requiring consideration is whether United States notes come under another rule in respect of taxation than that which applies to certificates of indebtedness.

The issues of United States notes were authorized by three successive acts. The first was the act of February 25, 1862;† the second, the act of July 11, 1862;‡ and the third, that of March 3, 1863.§

Before either of these acts received the sanction of Congress the Secretary of the Treasury had been authorized by the act of July 17, 1861,‖ to issue treasury notes not bearing interest, but payable on demand by the assistant treasurers at New York, Philadelphia, or Boston; and about three weeks later these notes, by the act of August 5, 1861,¶ had been made receivable generally for public dues. The amount of notes to be issued of this description was originally limited to fifty millions, but was afterwards, by the act of February 12, 1862,** increased to sixty millions.

These notes, made payable on demand, and receivable for all public dues, including duties on imports always payable in coin, were, practically, equivalent to coin; and all public disbursements, until after the date of the act last mentioned, were made in coin or these notes.

* See 12 Stat. at Large, 345, §§ 1, 2; Ib. 709; 18 Id. 218-19-21-22.
† 12 Stat. at Large, 345. ‡ Ib. 532. § Ib. 709.
‖ Stat. at Large, 259, § 6. ¶ Ib. 318, § 5. ** Ib. 338.

Opinion of the court.

In December, 1861, the State banks (and no others then existed) suspended payment in coin; and it became necessary to provide by law for the use of State bank notes, or to authorize the issue of notes for circulation under the authority of the national government. The latter alternative was preferred, and in the necessity thus recognized originated the legislation providing at first for the emission of United States notes, and at a later period for the issue of the national bank currency.

Under the exigencies of the times it seems to have been thought inexpedient to attempt any provision for the redemption of the United States notes in coin. The law, therefore, directed that they should be made payable to bearer at the treasury of the United States, but did not provide for payment on demand. The period of payment was left to be determined by the public exigencies. In the meantime the notes were receivable in payment of all loans, and were, until after the close of our civil war, always practically convertible into bonds of the funded debt, bearing not less than five per cent. interest, payable in coin.

The act of February 25, 1862, provided for the issue of these notes to the amount of one hundred and fifty millions of dollars. The act of July 11, 1862, added another hundred and fifty millions of dollars to the circulation, reserving, however, fifty millions for the redemption of temporary loan, to be issued and used only when necessary for that purpose. Under the act of March 3, 1863, another issue of one hundred and fifty millions was authorized, making the whole amount authorized four hundred and fifty millions, and contemplating a permanent circulation, until resumption of payment in coin, of four hundred millions of dollars.

It is unnecessary here to go further into the history of these notes, or to examine their relation to the national bank currency. That history belongs to another place, and the quality of these notes, as legal tenders, belongs to another discussion. It has been thought proper only to advert to the legislation by which these notes were authorized, in order that their true character may be clearly perceived.

That these notes were issued under the authority of the United States, and as a means to ends entirely within the constitutional power of the government, was not seriously questioned upon the argument.

But it was insisted that they were issued as money; that their

controlling quality was that of money, and that therefore they were subject to taxation in the same manner, and to the same extent, as coin issued under like authority.

And there is certainly much force in the argument. It is clear that these notes were intended to circulate as money, and, with the national bank notes, to constitute the credit currency of the country.

Nor is it easy to see that taxation of these notes, used as money, and held by individual owners, can control or embarrass the power of the government in issuing them for circulation, more than like taxation embarrasses its power in coining and issuing gold and silver money for circulation.

Apart from the quality of legal tender impressed upon them by acts of Congress, of which we now say nothing, their circulation as currency depends on the extent to which they are received in payment, on the quantity in circulation, and on the credit given to the promises they bear. In these respects they resemble the bank notes formerly issued as currency.

But, on the other hand, it is equally clear that these notes are obligations of the United States. Their name imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. No other dollars had before been recognized by the legislation of the national government as lawful money.

Would, then, their usefulness and value as means to the exercise of the functions of government, be injuriously affected by State taxation?

It cannot be said, as we have already intimated, that the same inconveniences as would arise from the taxation of bonds and other interest-bearing obligations of the government, would attend the taxation of notes issued for circulation as money. But we cannot say that no embarrassment would arise from such taxation. And we think it clearly within the discretion of Congress to determine whether, in view of all the circumstances attending the issue of the notes, their usefulness, as a means of carrying on the government, would be enhanced by exemption from taxation; and within the constitutional power of Congress,

having resolved the question of usefulness affirmatively, to provide by law for such exemption.

There remains, then, only this question, Has Congress exercised the power of exemption?

A careful examination of the acts under which they were issued, has left no doubt in our minds upon that point.

The act of February, 1862,* declares that "all United States bonds, and other securities of the United States, held by individuals, associations, or corporations, within the United States, shall be exempt from taxation by or under State authority."

We have already said that these notes are obligations. They bind the national faith. They are, therefore, strictly securities. They secure the payment stipulated to the holders, by the pledge of the national faith, the only ultimate security of all national obligations, whatever form they may assume.

And this provision is re-enacted in application to the second issue of United States notes by the act of July 11, 1862.†

And, as if to remove every possible doubt from the intention of Congress, the act of March 3, 1863,‡ which provides for the last issue of these notes, omits, in its exemption clause, the word "stocks," and substitutes for "other securities," the words "Treasury notes or United States notes issued under the provisions of this act."

It was insisted at the bar, that a measure of exemption in respect to the notes issued under this—different from that provided in the former acts, in respect to the notes authorized by them—was intended; but we cannot yield our assent to this view. The rule established in the last act is in no respect inconsistent with that previously established. It must be regarded, therefore, as explanatory. It makes specific what was before expressed in general terms.

Our conclusion is, that United States notes are exempt; and, at the time the New York statutes were enacted, were exempt from taxation by or under State authority. The judgment of the Court of Appeals must therefore be

REVERSED.

* 12 Stat. 346, § 2. † Ib. 546. ‡ Ib. 709.

THE GEORGIA.

1. A case in prize heard on further proofs, though the transcript disclosed no order for such proofs; it having been plain, from both parties having joined in taking them, that either there was such an order, or that the proofs were taken by consent.
2. A *bonâ fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

APPEAL from the District Court for Massachusetts, condemning as prize the steamship Georgia, captured during the late rebellion. The case, as derived from the evidence of all kinds taken in the proceedings, was thus:

The vessel had been built, as it appeared, in the years 1862–3, at Greenock, on the Clyde, as a war vessel, for the Confederate government, and called the Japan; or if not thus built, certainly passed into the hands of that government early in the spring of 1863. On the 2d of April of that year, under the guise of a trial trip, she steamed to an obscure French port near Cherbourg, where she was joined by a small steamer with armaments and a crew from Liverpool. This armament and crew were immediately transferred to the Japan, upon which the Confederate flag was hoisted, under the orders of Captain Maury, who had on board a full complement of officers. Her name was then changed to the Georgia, and she set out from port on a cruise against the commerce of the United States. After being thus employed for more than a year—having in the meantime captured and burnt many vessels belonging to citizens of the United States—she returned and entered the port of Liverpool on the 2d of May, 1864, a Confederate vessel of war, with all her armament and complement of officers and crew on board. At the time she thus entered the port of Liverpool, the United States vessels of war, Kearsarge, Niagara, and Sacramento, were cruising off the British and

French coasts in search of her, the Alabama, and other vessels of the rebel confederation. It was resolved at Liverpool that she should be sold. It appeared that Captain Bulloch, an agent of the Confederacy at the port, at first thought of selling her at private sale, together with her full armament; but failing in that, she was advertised for public sale the latter part of May and the first of June. A certain Edward Bates, a British subject and a merchant of Liverpool, dealing not unfrequently in vessels, attracted by the advertisements, entered into treaty about her. The broker concerned in making a sale of her, testified that "Bates was desirous of knowing what would buy the ship, but he wished the *armament excluded, as he did not want that.*" According to the statement of Bates himself, it had occurred to him that with her armament on board he might have difficulty in procuring a registry at the customs. All the guns, armament, and stores of that description, were taken out at Birkenhead, her dock when she first entered the port at Liverpool. The vessel had been originally strongly built, her deck especially; and this was strengthened by supports and stanchions. Though now dismantled, the deck remained as it was; the traces of pivot guns originally there still remaining. The adaptation of the vessel to her new service cost, it seemed, about £3000. How long she remained in port before she was dismantled was not distinctly in proof, though probably but a few weeks. The sale to Bates was perfected on the 11th June, 1864, by his payment of £15,000, and a bill of sale of the vessel from Bulloch, the agent of the Confederacy. He afterwards fitted her up for the merchant service, and chartered her to the government of Portugal for a voyage to Lisbon, and thence to the Portuguese settlements on the African coast. The testimony failed to show any complicity whatever of Bates with the Confederate purposes. But he had a general knowledge of the Georgia's career and history, testifying in his examination "that he knew from common report that she had been employed as a Confederate cruiser, but thought that if the United States government had any objection to the sale, they or their officers would have given

some public intimation of it, as the sale was advertised in the most public manner."

The American minister at the court of London, Mr. Adams, who was cognizant of the vessel's history from the beginning, and had kept himself informed of all her movements and changes of ownership, having, on the 14th March, 1863, called the attention of Earl Russell, the British Secretary for Foreign Affairs, to the rule of public law, affirmed by the courts of Great Britain, which rendered invalid the sale of belligerent armed ships to neutrals in time of war, and insisting on its observance during the war of the rebellion, and having remonstrated, on the 9th of May, 1864, against the use made by the Georgia of her Majesty's port of Liverpool, informed him, on the 7th of June following, and just before the completion of the transfer to Bates, that the Federal government declined "to recognize the validity of the sale of this armed vessel, heretofore engaged in carrying on war against the people of the United States, in a neutral port, and claimed the right of seizing it wherever it may be found on the high seas." Simultaneously with this note Mr. Adams addressed a circular to the commanders of the different war vessels of the United States, cruising on seas over which the Georgia was likely to pass in going to Lisbon, informing them that in his opinion "she might be made lawful prize whenever and under whatever colors she should be found."* Leaving Liverpool on the 8th August, 1864, the vessel was accordingly captured by the United States ship of war Niagara, off the coast of Portugal, on the 15th following, and sent into New Bedford, Massachusetts, for condemnation. A claim was interposed by Bates, who afterwards, on the 31st January, 1865, filed a test affidavit averring that he was the sole owner of the vessel, was a merchant in Liverpool, and a large owner of vessels, that he had fitted out the Georgia at Liverpool for sea, and chartered her to

* Correspondence between Mr. Adams and Earl Russell, and Mr. Adams and Mr. Seward, communicated with the President's messages to the first and second sessions of the Thirty-eighth Congress.

the Portuguese government for a voyage to Lisbon, and thence to the Portuguese settlements on the coast of Africa, and that while on her voyage to Lisbon in a peaceable manner, she was captured, as already stated.

The proofs in the case were not confined to the documentary evidence found on board the prize, and to the answers to the standing interrogatories in *preparatorio*, but the case was heard before the court below without restriction, and without any objection in it upon additional depositions and testimony, although, so far as the printed transcript of the record before the court showed, no order for further proof had been made. The counsel of both government and claimant, however, had joined in taking the additional testimony, and among the witnesses was Bates himself, whose deposition with its exhibits occupied fifty-six pages out of the one hundred and forty-seven which made the transcript.

The court below condemned the vessel.

Mr. Marvin, for the claimant, appellant in this case:

It was the duty of the court below, and it is the duty of this court now, to hear the case upon the documents found on the vessel, and the depositions in *preparatorio*,* as there was no order for further proof, or no other evidence. This is not a mere matter of practice, but it is the very essence of prize law.† The case not having been so heard in the court below, and no order for further proof having been granted by the court, all the other depositions should be disregarded by this court. If they are so disregarded, the captors have, we assume it to be plain, no case.

But waiving this, and taking the case as presented on the whole testimony, this question arises: "Does a neutral, who purchases from one of two belligerents, in good faith and for commercial purposes, in his own home port, a vessel lying there, which had been used by such belligerent as a

* Paper of Sir William Scott and Sir John Nicholl, addressed to his Excellency John Jay, 1 Robinson, Appendix, 390; The Haabet, 6 Id. 54.

† 3 Phillimore, 594, § 473.

vessel of war, but which had been disarmed, take a good title as against the right of capture of the other belligerent?"

We think that he does. No principle of international law prohibits a neutral, in his home port, from buying from or selling to any person, any and every species of property. In a home neutral port there is no room for the operation of international interdicts; nor does international law invalidate any sales made in such port. Indeed, sound policy requires that the enemy should be allowed and even encouraged to sell his naval vessels. They cannot be blockaded in a neutral port, and can escape out of such port when they will. The right to the *chances* of capturing them on the ocean is of much less value to a belligerent than their absence from the ocean would be.

The validity of the purchase of the enemy's merchant ships by a neutral, even where the purchase and transfer have been effected in the enemy's port, under blockade, has been fully recognized.* Can this case be distinguished in principle? We think that it cannot.

Mr. Evarts, Attorney-General, and Mr. Ashton, Assistant Attorney-General, contra:

1. This court is entitled to look into all the proofs found in the record. The depositions, by way of further proof, were obviously taken and introduced into the cause by the agreement and consent of the parties.

2. When a neutral deals with belligerent privates about private property, his dealings are generally lawful; but when he deals with a belligerent sovereign, when the subject of dealing are public vessels, public funds, public property of any kind, it is unlawful. While neutrals have rights, so too they have obligations; obligations founded on the rights of belligerents. Thus neutrals cannot give assistance to one belligerent when reduced by the other to distress. Hence it is that a neutral may be captured and condemned if at-

* The Sechs Geschwistern, 4 Robinson, 101; The Virilantia, 6 Id. 123; The Bernon, 1 Id. 102.

tempting to run a blockade, or if carrying contraband; and hence, too, that articles not otherwise contraband of war become so when sent to aid an enemy reduced to distress. This is the principle which we seek to apply. Suppose an armed vessel driven into a neutral port by cruisers who lie outside, and who would capture her the moment she came out. In such a case any truly neutral government would refuse to have its ports used as places of refuge. The vessel would have to sail out, and would sail of course into the jaws of capture. But if the hard-pressed enemy can dismantle and sell, how is neutrality maintained? The purchase-money can be taken at once and applied to other warlike purposes; to the purchase or building of new ships in new places. The law of nations cannot be charged with the inconsistency of prohibiting a neutral from permitting the use of his territory by a belligerent as an asylum for his vessels of war, and on the other, of suffering the sale of such vessels within neutral protection, by which the same advantage may be gained by the belligerent as if he had an absolute right to employ the neutral territory as a place of safe resort from his successful enemy. A title may indeed pass in a case of sale like this, but it passes subject to the right of capture.

The Minerva,* decided by Sir W. Scott, covers our ground. There was, indeed, some evidence of collusion in that case, but Sir W. Scott undoubtedly intended to say, and did say in that case, that an enemy's vessel of war, lying in a neutral port, was not an object fairly within the range of commercial speculation, and he unquestionably intended to place his judgment of condemnation as well upon this principle, as upon the independent view that, upon the special facts of that case, the purchase was collusive, and had been made with the intent to convey the vessel into the possession of the former belligerent owner. The principle was lately acted upon by that able jurist, Field, J., of the District Court of New Jersey, in the unreported case of *The Etta*, under circumstances much the same as those of the Georgia.

* 6 Robinson, 397.

Reply:

The Minerva was unlike the present case in many important particulars. It was the case of a pretended purchase of a ship of war, with eighteen guns and ammunition, captured while on her way ostensibly to the port of the purchaser, but really to a port of the enemy; fourteen guns and ammunition having been taken out for the mere convenience of conveyance. Though the vessel lay at a neutral port, the negotiations for the purchase were carried on at the enemy's port, and an enemy crew and captain were hired there and sent to bring home the ship. She was captured in possession of an enemy master and crew, and while sailing close into the enemy's coast. In fact the vessel was going, under color of purchase and sale, right back again into the enemy's navy. The vessel had not been dismantled, except in part for the convenience of transportation, the purchaser buying guns and ammunition with the vessel. There was no proof in the case that the purchaser had paid for the vessel, or that he had bought her for commercial purposes only. It was the case of a mere colorable purchase. It is true that Sir W. Scott assumes to place the decision of the case on the ground of the illegality of the purchase. But he does so unnecessarily.

Mr. Justice NELSON delivered the opinion of the court.

It is insisted by the learned counsel for the claimant, that all the depositions in the record, except those in *preparatorio*, should be stricken out, or disregarded by the court on the appeal, for the reason that it does not appear that any order had been granted on behalf of either party to take further proofs. But the obvious answer to the objection is that it comes too late. It should have been made in the court below. As both parties have taken further proofs, very much at large, bearing upon the legality of the capture, without objection, the inference is unavoidable that there must have been an order for the same, or, if not, that the depositions were taken by mutual consent. They were taken on interrogatories and cross-interrogatories, in which the counsel of

both parties joined, and, among other witnesses examined, is the claimant himself, whose deposition, with the papers accompanying it, fill more than one-third of the record.

As respects the vessel, we are satisfied, upon the proofs, that the claimant purchased the Georgia without any purpose of permitting her to be again armed and equipped for the Confederate service, and for the purpose, as avowed at the time, of converting her into a merchant vessel. He had, however, full knowledge of her antecedent character, of her armament and equipment as a vessel of war of the Confederate navy, and of her depredations on the commerce of the United States, and that, after having been thus employed by the enemies of this government upwards of a year, she had suddenly entered the port of Liverpool with all her armament and complement of officers and crew on board. He was not only aware of all this, but, according to his own statement, it had occurred to him that this condition of the vessel might afford an objection to her registry at the customs; and before he perfected the sale, he sought and obtained information from some of the officials that no objection would be interposed. He did not apply to the government on the subject.

The claimant states "that he knew from common report she (the Georgia), had been employed as a Confederate cruiser, but I thought," he says, "if the United States government had any objection to the sale, they or their officers would have given some public intimation of it, as the sale was advertised in the most public manner." If, instead of applying to an officer of the customs for information, the claimant had applied to his government, he would have learned that as early as March 14th, 1863, Mr. Adams, our minister in England, had called the attention of Lord Russell, the foreign secretary, to the rule of public law, as administered by the highest judicial authorities of his government, which forbid the purchase of ships of war, belonging to the enemy, by neutrals in time of war, and had insisted that the rule should be observed and enforced in the war

then pending between this government and the insurgent States. And also that he had addressed a remonstrance to the British government on the 9th of May, but a few days after the Georgia had entered the port of Liverpool, against her being permitted to remain longer in that port than the period specified in her Majesty's proclamation. His own government could have advised him of the responsibilities he assumed in making the purchase. Mr. Adams, after receiving information of the purchase by the claimant, in accordance with his views of public law, above stated, communicated with the commanders of our vessels cruising in the Channel, and expressed to them the opinion that, notwithstanding the purchase, the Georgia might be made lawful prize whenever and under whatever colors she should be found sailing on the high seas.

The principle here assumed by Mr. Adams as a correct one, was first adjudged by Sir William Scott in the case of *The Minerva*,* in the year 1807. The head note of the case is: "Purchase of a ship of war from an enemy whilst lying in a neutral port, to which it had fled for refuge, is invalid." It was stated in that case by counsel for the claimant, that it was a transaction which could not be shown to fall under any principle that had led to condemnation in that court or in the Court of Appeal. And Sir William Scott observed, in delivering his opinion, that he was not aware of any case in his court, or in the Court of Appeal, in which the legality of such a purchase had been recognized. He admitted there had been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase had been sustained. But "whether the purchase of a vessel of this description, built for war and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerent, and driven into a neutral port for shelter—whether the purchase of such a ship can be allowed, which shall enable the enemy, so far to secure himself from the disadvantage into which he

* 6 Robinson, 397.

has fallen, as to have the value at least restored to him by a neutral purchaser," he said, "was a question on which he would wait for the authority of the superior court, before he would admit the validity of the transfer." He denied that a vessel under these circumstances could come fairly within the range of commercial speculation.

It has been insisted in the argument here, by the counsel for the claimant, that there were facts and circumstances in the case of *The Minerva*, which went strongly to show that the sale was collusive, and that, at the time of the capture, she was on her way back to the enemy's port. This may be admitted. But the decision was placed, mainly and distinctly, upon the illegality of the purchase. And such has been the understanding of the profession and of text-writers, both in England and in this country; and as still higher evidence of the rule in England, it has since been recognized as settled law by the judicial committee of her Majesty's privy council. In the recent learned and most valuable commentaries of Mr. Phillimore (now Sir Robert Phillimore, Judge of the High Court of Admiralty of England), on international law, he observes, after stating the principles that govern the sale of enemies' ships, during war, to neutrals: "But the right of purchase by neutrals extends only to merchant ships of enemies, for the purchase of ships of war belonging to enemies is held invalid." And Mr. T. Pemberton Leigh, in delivering judgment of the judicial committee and lords of the privy council, in the case of *The Baltica*,† observes: "A neutral, while war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war), from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port." Mr. Justice Story lays down the same distinction in his "Notes on the Principles and Practice of Prize Courts,"*—a work that has been selected by the British government for the use of its naval officers, as the best code of instruction in the prize law.† The same principle is found

* Page 68, Pratt's London edition.

† See 11th Moore's Privy Council, 145.

in Wildman on International Rights in Time of War, a valuable English work published in 1850, and in a still more recent work, Hosack on the Rights of British and Neutral Commerce, published in London in 1854, this question is referred to in connection with sales of several Russian ships of war, which it was said had been sold in the ports of the Mediterranean to neutral purchasers, for the supposed purpose of defeating the belligerent rights of her enemies in the Crimean war, and he very naturally concludes, from the case of *The Minerva*, that no doubt could exist as to what would be the decision in case of a seizure.* This work was published before the judgment of the privy council in the case of *The Baltica*, which was a Russian vessel, sold *imminente bello;* being, however, a merchant ship, the purchase was upheld; but, as we have seen from the opinion in that case, if it had been a ship of war it would have been condemned.†

It has been suggested that, admitting the rule of law as above stated, the purchase should still be upheld, as the Georgia, in her then condition, was not a vessel of war, but had been dismantled, and all guns and munitions of war removed; that she was purchased as a merchant vessel, and fitted up, *bonâ fide*, for the merchant service. But the answer to the suggestion is, that if this change in the equipment in the neutral port, and in the contemplated employment in future of the vessel, could have the effect to take her out of the rule, and justify the purchase, it would always be in the power of the belligerent to evade it, and render futile the reasons on which it is founded. The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy. The removed armament of a vessel, built for war, can be readily replaced,

* Page 82, note.

† See also Lawrence's Wheaton, note 182, p. 561, and *The Etta*, before Field, United States district judge of New Jersey.

and so can every other change be made, or equipment furnished for effective and immediate service. The Georgia may be instanced in part illustration of this truth. Her deck remained the same, from which the pivot guns and others had been taken; it had been built originally strong, in order to sustain the war armament, and further strengthened by uprights and stanchions beneath. The claimant states that the alterations, repairs, and outfit of the vessel for the merchant service, cost some £3000. Probably an equal sum would have again fitted her for the replacement of her original armament as a man of war.

The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals, in a neutral port, and of merchant vessels, is founded on reason and justice. It prevents the abuse of the neutral by partiality towards either belligerent, when the vessels of the one are under pressure from the vessels of the others, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy.

That the Georgia, in the present case, entered the port of Liverpool to escape from the vessels of the United States in pursuit, is manifest. The steam frigates Kearsarge, Niagara, and Sacramento were cruising off the coast of France and in the British Channel, in search of this vessel and others that had become notorious for their depredations on American commerce. It was but a few days after the purchase of the Georgia by the claimant, the Alabama was captured in the Channel, after a short and brilliant action, by the Kearsarge. The Georgia was watched from the time she entered the port of Liverpool, and was seized as soon as she left it.

The question in this case cannot arise under the French code, as, according to that law, sales even of merchant vessels to a neutral, *flagrante bello*, are forbidden. And it is understood that the same rule prevails in Russia. Their law, in this respect, differs from the established English and American adjudications on this subject.

It may not be inappropriate to remark, that Lord Russell

advised Mr. Adams, on the day the Georgia left Liverpool under the charter-party to the Portuguese government, August 8th, 1864, her Majesty's government had given directions that, "In future, no ship of war, of either belligerent, shall be allowed to be brought into any of her Majesty's ports for the purpose of being dismantled or sold."

DECREE AFFIRMED.

INSURANCE COMPANY v. TWEED.

1. The act of March 8d, 1865 (13 Statutes at Large, 501), which provides by its fourth section a mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed here, and also what may be reviewed in such cases, binds the Federal courts sitting in Louisiana as elsewhere, and this court cannot disregard it.

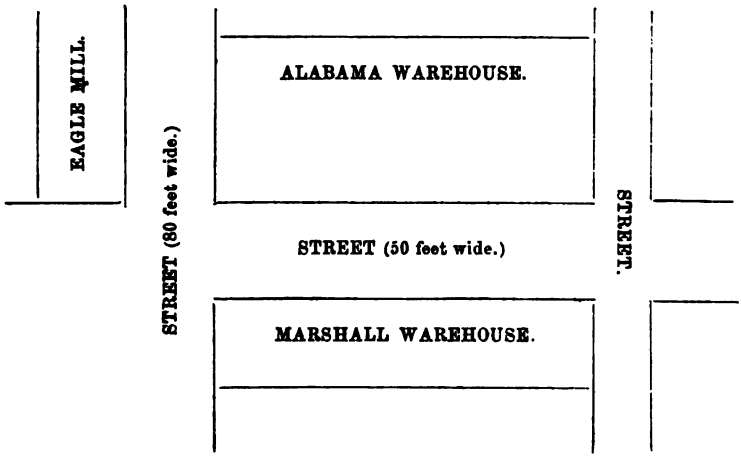
   However, in a case where the counsel for both parties in this court had agreed to certain parts of the opinion of the court below as containing the material facts of the case, and to treat them here as facts found by that court, this court acted upon the agreement here as if it had been made in the court below.

2. Cotton in a warehouse was insured against fire, the policy containing an exception against fire which might happen "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane." An explosion took place in another warehouse, situated directly across a street, which threw down the walls of the first warehouse, scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares of buildings, and among them the warehouse where the cotton was stored, which, with it, was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but came more immediately from a third building which was itself fired by the explosion. Wind was blowing (with what force did not appear) from this third building to the one in which the cotton was stored. But the whole fire was a continuous affair from the explosion, and under full headway in about half an hour. *Held*, that the insurers were not liable; the case not being one for the application of the maxim, "*Causa proxima, non remota, spectatur.*"

TWEED brought suit in the Circuit Court for the Eastern District of Louisiana against the Mutual Insurance Company, on a policy of insurance against fire, which covered

certain bales of cotton in a building in Mobile, known as the Alabama Warehouse. The policy contained a proviso that the insurers should not be liable to make good any loss or damage by fire which might happen or take place "*by means* of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake, or hurricane."

During the time covered by the policy an explosion took place in another building, the Marshall Warehouse, situated directly across a street, which threw down the walls of the Alabama Warehouse, and scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares of buildings, among which the Alabama Warehouse, and the cotton stored in it, were wholly destroyed.



It is to be understood, however, that the fire was not communicated directly from the Marshall Warehouse, in which the explosion occurred, to the Alabama Warehouse, but that it came more immediately from a third building—the Eagle Mill—which was itself fired by the explosion. The wind (with what force did not appear) was blowing in a direction from the Eagle Mill to the Alabama Warehouse. But the whole fire was a continuous affair from the explosion, and under full headway in about half an hour.

Argument for the insurers.

Upon this state of facts the court below held that the principle, "*Causa proxima, non remota, spectatur*," applied; and that accordingly the fire which consumed this cotton did not "happen or take place by means of an explosion." It, therefore, gave judgment for the plaintiff below. The correctness of this view was the question now to be decided here on error.

The case was tried by the court below without a jury. There was no bill of exceptions, nor any ruling on any proposition of law raised by the pleadings. The evidence seemed to have been copied into the transcript, but whether it was all the testimony, or how it came to be there, there was nothing to show. However, in the court's opinion (or, as it was styled, "reasons for judgment"), the learned judge below quoted considerable portions of the evidence, in order to show the grounds for the conclusion which he had reached. And the counsel in this court agreed to certain parts of the opinion so given as presenting a correct statement of the case.

Mr. Evarts, for the insurers, plaintiffs in error:

I. A *general* solution of the problems of difficulty which the variety of the actual circumstances of insurance risks has raised for judicial decision has been thought to have been reached in the maxim, "*Causa proxima, non remota, spectatur.*" But this rule has itself been proved to cover some fallacies which lurk under every generality. The most celebrated judges have given a contrary application of the maxim upon identical states of fact.

The controversy, whether nearness of *time* or closeness of *efficiency* in the competing causes satisfied the maxim, and the still larger controversy, as to what secondary and subordinate agencies were to be treated as swallowed up in a *predominating cause*, have resulted in closer practical definitions, which may be trusted as the rule of the law in the premises. They are thus stated by the judicious commentator, Mr. Phillips.*

* 1 Phillips on Ins., § 1, 182, and see Ibid., § 187.

"In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster."

II. The contract in this case shows a circumspect attention to the true description of the risks excepted:

1. In the words used to accomplish the desired discrimination, so that the sense, to the apprehension of practical men, is neither obscure, equivocal, nor incomplete.

2. In the comprehension of, and attention to, the legal distinctions and criticisms which judicial decisions have applied to the subject with which the contract deals.

3. In the association in which the excepted cause of fire by means of explosion is found; for these other causes of fire are, indisputably, in their nature and mode of operation, neither direct nor immediate *processes* of ignition or combustion; but are either moral or physical agencies, in the progressive operation of which fire *may* be lighted or propagated.

Whatever difficulty, then, can arise to disappoint the intent of the parties in their contract must be referred to some strange or obscure state of facts, which has eluded all their forecast. But the facts make neither doubt, difficulty, obscurity, or uncertainty, as to the relation of the primary cause and the subordinate means by which the property insured was destroyed by fire:

1. The security against fire of the property insured is first invaded by the explosion in close proximity, which itself and instantly denudes the combustible property insured of the protecting walls of the building within which the terms of the insurance require it to be, and exposes it, naturally and probably, to fire, if fire shall happen.

2. The explosion, itself and instantly, lights the fire which, as a single, progressive, uninterrupted, and irresistible conflagration, consumes the property insured.

3. No *new* cause, influence, or means is interposed between (1) the explosion and the lighting of the fire which it

caused, or (2) the lighting of the fire and the destruction by its flames of the property insured, to which any efficiency towards or any responsibility for the loss can be imputed.

The suggestion which will be made on the other side, that the *propagation* of the flames, by the course of the wind, or the intermediate combustible matter, introduced a new *cause* or *means* of loss, is only important as indicating the *absence* of any efficient cause, in the sense of insurance law, to relieve the explosion from being the predominating cause and the effectual means of the destroying fire.

The authorities show that within any accepted interpretation of the rule of "*causa proxima, non remota, spectatur*," the loss was by "fire which happened or took place by means of explosion." A leading case is *St. John* v. *Insurance Company*, considered in the Superior Court of New York,* and in the Court of Appeals.† The syllabus in the report of the Superior Court is thus:

"When it is provided by the conditions annexed to a policy of insurance against fire, that the company shall not be 'liable for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specially specified in the policy,' although fire may be the proximate cause of the loss that is claimed, the company is not liable when it appears that the fire was directly and wholly occasioned by an explosion."

Numerous other cases give a similar view of the rule.‡

Mr. Billings, contra:

To exempt the insurers the explosion must have been the direct cause of the fire. But contrary to what is maintained

* 1 Duer, 871.

† 1 Kernan, 516.

‡ General Insurance Company v. Sherwood, 14 Howard, 867; Montoya v. London Assurance Company, 6 Exchequer, 451; Tilton v. Hamilton Insurance Company, 1 Bosworth, 867; Brady v. Northwestern Insurance Company, 11 Michigan, 425; Lewis v. Springfield Insurance Company, 10 Gray, 159; Strong v. Sun Insurance Company, 31 New York, 103; City Fire Insurance Company v. Corlies, 21 Wendell, 867.

Argument for the party insured.

by opposite counsel, the facts show that while the explosion was remotely tributary to the loss, as were many other circumstances, it was far removed from the agency applying it. This is the order of events: an explosion takes place, by force of which a fire is kindled in the Eagle Mill; more than half an hour afterwards, the wind, aided by inflammable substances in the street, and at a distance on the opposite side of the street, kindles a fire which consumes the cotton.

The first fire in the Eagle Mill was, if we concede to direct causation its broadest sense, caused by an explosion; the second, by the wind; for, had the wind blown in the opposite direction, the cotton would have remained unharmed. With the kindling of the first fire the explosion was entirely spent and had, as a cause, a full interruption and end.

The rule of law, of which opposite counsel would dispose by the statement,—hardly, we should hope, for the honor of juridical science, warranted in fact,—that "*the most celebrated* judges have given a *contrary* application of the maxim upon *identical* states of fact," has been handed down to us in the apothegmatic form which it enjoys by a no less personage than Lord Chancellor Bacon. And he shows the weighty reasons of it also. "It were infinite," he says, "for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree."

The authorities, we apprehend, do but illustrate the maxim.

In *Livie* v. *Janson*,* a ship was insured against the perils of the sea, but not against capture, and met with sea damage, which checked her rate of sailing, in consequence of which she was captured. The loss was ascribed to the capture, and not to the sea damage.

In *Hodgson* v. *Malcolm*,† where the crew who were sent ashore, were imprisoned by a press-gang, and thereby pre-

* 12 East, 648.

† 5 Bosanquet and Puller, 336.

vented from casting off a rope, and in consequence the ship went ashore and was lost, it was held a loss by the perils of the sea.

In *Redman* v. *Wilson*,* a vessel insured against perils of the sea, in consequence of unskilful lading, became leaky, and having been pronounced unseaworthy, to save the cargo, was run ashore. Held, that the insurers were liable, the immediate cause of the loss being the perils of the sea.

And so more recent English cases.† American authorities equally assert the distinction maintained in Bacon's maxim.‡

[In reply to some remarks by the bench as to the irregular and defective character of the record, tested by the rules of the common law, and as to the absence of any certain *case* on which judgment could be given, Mr. Billings observed that the record, he believed, was in the frequent form of those from Louisiana, and that the opinion of the court presented a sufficient finding of the fact. By consent of counsel, at any rate, in this court, certain parts of the opinion (the parts given as the case in the reporter's statement, *supra*, p. 45), were to be received as containing the material facts.]

Mr. Justice MILLER delivered the opinion of the court.

There is, in this case, as presented by the transcript, nothing which a writ of error can bring here for review tested by the rules of the common law.

The distinction between law and equity prevails in the Federal courts sitting in Louisiana in the modes of proceeding, notwithstanding the Civil Code, which governs the practice as well as the rights of parties in the State courts. On account of the peculiarity in practice in that State, it has been decided in several cases coming from the State courts

* 14 Meeson and Welsby, 476.

† Ionides v. The Universal Insurance Company, 8 Law Times, new series, p. 705; Marsden v. The City and County Assurance Company, 18 Law Times, 465; Thomson v. Hopper, Ellis, Blackburn and Ellis, 1038.

‡ Columbia Insurance Company v. Lawrence, 10 Peters, 517; Waters v. Merchants' Insurance Company, 11 Id. 221.

of Louisiana to this court by writ of error, that we would regard the statements of fact found in the opinions of the court as part of the record, where they were in themselves sufficient and otherwise unobjectionable. And perhaps this may in practice have been extended to cases from the Federal courts of that district. But in regard to the latter, we are not now at liberty to do so. The act of March 3d, 1865,* by its fourth section provides a clear and simple mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed here, and also prescribes what may be reviewed in such cases. This statute, which is but a reproduction of the system in practice in many of the States, is as binding on the Federal courts sitting in Louisiana as elsewhere, and we cannot disregard it.

We are asked in the present case to accept the opinion of the court below, as a sufficient finding of the facts within the statute, and within the general rule on this subject. But with no aid outside the record we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, "reasons for judgment."

But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made.

Upon an examination of the facts thus stated, and placing upon them that construction most favorable to the judgment of the court, we are of opinion that it cannot be sustained.

The only question to be decided in the case is, whether

* 13 Stat. at Large, 501.

the fire which destroyed plaintiff's cotton, happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract.

That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.

One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. That may have been the usual course of the breeze in that neighborhood. Its force may have been trifling. Its influence in producing the fire in the Alabama Warehouse was too slight to be substituted for the explosion as the cause of the fire.

But there are other causes of fire mentioned in the exempting clause, and they throw light on the intent of the parties in reference to this one. If the fire had taken place by means of invasion, riot, insurrection, or civil commotion, earthquake, or hurricane, and by either of these means the Marshall Warehouse had been first fired, and the fire had

extended, as we have shown it did, to the Alabama Warehouse, would the insurance company have been liable?

Could it be held as necessary to exemption that the persons engaged in riot or invasion must have actually placed the torch to the building insured, and that in such case if half the town had been burned down the company would have been liable for all the buildings insured, except the one first fired? Or if a hurricane or earthquake had started the fire, is the exemption limited in the same manner?

These propositions cannot be sustained, and in establishing a principle applicable to fire originating by explosion, we must find one which is equally applicable under like circumstances to the other causes embraced in the same clause.

Without commenting further, we are clearly of opinion that the explosion was the cause of the fire in this case, within the meaning of the policy, and that the judgment of the Circuit Court must be

REVERSED AND A NEW TRIAL GRANTED.

THE CHINA.

1. A State pilot law having provided for the educating and licensing of a body of pilots, enacted that all masters of foreign vessels bound to or from one of the State ports "*shall* take a licensed pilot, or, in case of refusal to take such pilot, *shall* pay pilotage as if one had been employed." It enacted further, that any person not licensed as a pilot, who should attempt to pilot a vessel as aforesaid, should be "deemed guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding $100, or imprisonment not exceeding sixty days," and that all persons employing any one to act as a pilot not holding a license, should "forfeit and pay the sum of $100." The pilot first offering his services to a vessel inward bound had a right to pilot her in, and when she went out the right to pilot her out. *Held*, that under this statute vessels were compelled to take a pilot.
2. *But held*, further (the statute containing no clause exempting the vessel or owners from liability for the pilot's mismanagement), that the responsibility of the vessel for torts committed by it not being derived from the law of master and servant, or from the common law at all, but from maritime law, which impressed a maritime lien upon the vessel in

Statement of the case.

whosesoever hands it might be for torts committed by it, the fact that the statute thus compelled the master to take the pilot did not exonerate the vessel from liability to respond for torts done by it, as *ex gr.*, for a collision, though the result wholly of the pilot's negligence.

ERROR to the Circuit Court for the Southern District of New York.

The pilot act of New York, having provided for the education and licensing of a body of pilots, enacts that all masters of foreign vessels, bound to or from the port of New York, "*shall* take a licensed pilot, or, in case of refusal to take such pilot, *shall* pay pilotage as if one had been employed." It enacts, further, that any person not licensed as a pilot, who shall attempt to pilot a vessel bound as aforesaid, "shall be deemed *guilty of a misdemeanor*, and be punished by a fine not exceeding $100; OR, *imprisonment not exceeding sixty days.* And all persons employing a person to act as pilot, not holding a license, shall forfeit and pay to the board of commissioners of pilots the sum of $100." The pilot first offering his services to a vessel inward bound is entitled to pilot her in, and when she goes out has the right, by port rules, to pilot her out.

This pilot act of New York, it may be observed—differing from certain acts of Great Britain, known as the "*General Pilot Acts*," though agreeing with others, sometimes called local pilot acts, to wit, the Liverpool pilot act and the Newcastle pilot act, and also in its main features with a Pennsylvania pilot act (though this inflicts no penalty of imprisonment, and provides only for a money fine of half pilotage, in case of refusal)—does not contain any provision to the effect that the owner or master of any ship shall not be liable for any loss or damage occasioned by the neglect, incompetency, or default of any licensed pilot.

With the pilot act of New York, above set forth, in force, the steamer China, a foreign vessel bound from the port of New York, and being then in pilot waters, and in charge of a licensed pilot of that port, ran into the Kentucky, a vessel of the United States, and sunk her. The collision was occasioned by gross fault of the licensed pilot then in charge

Argument for the offending vessel.

of the China. The owners of the Kentucky accordingly libelled the offending vessel in the District Court of New York. Her owners set up for defence, that at the time of the collision she was in charge of a pilot duly licensed by the State of New York; that the said pilot was taken in conformity with the laws of that State; that *he* directed all the manœuvres of the steamer which preceded the collision, and that the same was not in consequence of any negligence of her officers or crew.

The case thus presented the question whether a vessel, in charge of a licensed pilot, whom the statutes of the State governing the port whence she sailed, enacted positively that the vessel should take aboard under penalties named, was liable *in rem* for a tort committed by her, the result wholly of this pilot's negligence.

The District Court held that she was, and the Circuit Court having affirmed the decree, the question was now here on appeal.

Mr. D. D. Lord, for the owners of the China, appellants, contended that the pilot act of New York was imperative. The China was compelled to take a licensed pilot, and had not even a right to choose from the body. If this was so, the conclusion which the appellants sought to establish followed; for nothing could be more unjust than for judicial law to hold men responsible for the consequences of acts which statute law compelled them to perform, and for the non-performance of which, if they had not performed them, the judicial law itself would have fined or imprisoned them.

The fact that there was no "exemption" clause in the New York statute was not important. That clause in the general pilot acts of Great Britain only gave words and form to a principle resulting already from previous requirements, the principle being, that the owners of the ship having been compelled to surrender her to an agent of the law, in whose selection they had no voice, and over whom, when put in charge, they had no power in any ordinary case, they should not be held responsible for his mismanagement; a misman-

agement which it was reasonable to infer would not have occurred had they selected their own agent.

These views are supported by English cases* which overrule other ones, perhaps, not consistent with our position. The American cases do not conflict with it. They all arose from the acts of pilots not taken by compulsion of law. In *The Creole*,† decided by Mr. Justice Grier, the strongest case against us, it was held expressly that the statute (which provided only for a money fine of half pilotage in case of refusal to take a pilot), was not compulsory.

Mr. Evarts, contra:

1. The theory of the specific responsibility of the offending vessel to make good the injury which her improper navigation has inflicted upon an innocent sufferer proceeds upon reasons, both of justice and of policy, which exclude the protection against such responsibility asserted on the other side. This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the *adjustment* among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel. It also gives to the sufferer the security of redress which the vessel itself, in its value and its subjection to judicial recourse, furnishes, as contrasted with the contingencies of personal sufficiency or personal accessibility of the individuals in fault. Accordingly, in practical execution of this theory, the very blow which inflicts the culpable injury upon the innocent vessel, impresses in her favor a *lien* of indemnity upon the offending vessel. The proceeding *in rem* of the admiralty is but a judicial consummation of this lien, and requires for its support nothing but proof of such fault of the vessel as, by the rules of maritime law, raises the

* The Argo, Swabey, 462; The Fama, 2 W. Robinson, 184; The Batavia, Ib. 407; The Agricola, Ib. 10; The Maria, 1 Id. 95; The Protector, Ib. 45; The Christiana, 2 Haggard, 183; Ritchie *v.* Bowsfield, 7 Taunton, 309; Carruthers *v.* Sidebotham, 4 Maule & Selwyn, 77.

† 2 Wallace, Jr., 485.

lien. To displace this lien, and defeat this recourse *in rem*, and thus reduce the sufferer to recourse against the individual in fault, is, in effect, to supplant the admiralty jurisprudence and the admiralty procedure, and overthrow the reasons of justice and policy upon which they are built up. Such consequences can be assigned only to legislation of paramount authority over the jurisprudence and the jurisdiction.

2. The collision between the Kentucky, a vessel of the United States, and the China, a foreign steamer, having occurred upon the high seas, the municipal legislation of the State of New York is inadequate to the authority imputed to it, in derogation of the admiralty jurisdiction or the principles of its administration. The foreign commerce of the United States cannot be withdrawn by State legislation from the protection of the admiralty jurisdiction conferred upon the Federal judiciary, in plenary and exclusive terms, by the Constitution.

3. The pilotage regulations of New York are simply in support of the *emoluments* of the pilot service, provided by the State, in aid of the commerce of its ports.

4. The British statutes have made determinate and peremptory provisions, both of compulsion upon the vessel to employ the pilot and of exemption from responsibility while directed by him.

5. But the doctrine of the British Admiralty Court, that the enjoining by statute of the taking of a pilot, and, in case of refusal, requiring the payment of pilotage dues, amounts to a *compulsion* to take a pilot, and exempts the ship from responsibility while navigated under his charge, has never been followed in this country. It seems never to have found favor with Sir William Scott.* And the whole doctrine seems to be regarded with great distrust, notwithstanding the policy has been adopted in the statutes.† The

* The Neptune the Second, 1 Dodson, 467.

† The General de Caen, Swabey, 10; The Mobile, Ib. 69, 129; The Diana, 1 W. Robinson, 185; The Protector, Ib. 45, 57; The Massachusetts, Ib. 378; The Christiana, 7 Moore, Privy Council, 160; The Schwable, 14 Id.

American cases are of uniform tenor,* and the whole subject has been recently reviewed, and the doctrine of continued liability, notwithstanding the pilot regulations of the statutes, firmly established by Mr. Justice Grier in an important case in the Pennsylvania circuit.†

Mr. Justice SWAYNE delivered the opinion of the court.

This is a case arising out of a collision between the steamship China, a British vessel, then leaving the port of New York for Liverpool, and the brig Kentucky, then on a voyage from Cardenas to New York. The facts are few and undisputed. The collision occurred on the 15th of July, 1863, a short distance outside of Sandy Hook. The brig was sunk. The steamship was wholly in fault. It was not alleged, in the argument here for the appellants, that there was either fault or error on the part of the brig. The case turns upon the effect to be given to the statute of New York, of the 3d of April, 1857. At the time of the collision the steamship was within the pilot waters of the port of New York, and was in charge of a pilot, licensed under this act, and taken by the master pursuant to its provisions. The pilot's orders were obeyed, and the catastrophe was entirely the result of his gross and culpable mismanagement. No question was made in the argument, upon the subject; the evidence is too clear to admit of any. These are all the facts material to be considered.

The questions with which we have to deal, are questions of law. No others arise in the case.

It is insisted by the appellants that the statute referred to compelled the master of the steamship to take the pilot, and that they are therefore not liable for the results of his misconduct.

241; The Halley, 2 Admiralty and Ecclesiastical Law Report Series, 8; The Mina, Ib. 97; The Lion, Ib. 102.

* Bussy *v.* Donaldson, 4 Dallas, 206; Williamson *v.* Price, 4 Martin, N. S. 399; Yates *v.* Brown, 8 Pickering, 23; Denison *v.* Seymour, 9 Wendell, 1; Smith *v.* Condry, 1 Howard, 28; The Lotty, Olcott, 329.

† The Creole, 2 Wallace, Jr., 485.

British adjudications are relied upon in support of both these propositions. In order to appreciate these authorities, the British pilot acts must be understood. They are the 52 George III, ch. 30; the 6 George IV, ch. 125; the Shipping Act of the 17 and 18 Victoria, ch. 104; the Liverpool Pilot Act of 37 George III, ch. 789, and the Newcastle Pilot Act of the 41 George III, ch. 86. The three first mentioned contain equivalent provisions. The same remark applies to the two latter. The former all contain a clause to the effect that the "owner or master of any ship shall not be answerable for any loss or damage occasioned by the neglect, default, incompetency, or incapacity of any licensed pilot." The latter contain a system of local pilot regulations, but have no such provision. They require that a pilot shall be taken, and if not taken, that pilotage shall, nevertheless, be paid.. In these respects, and in most others, they are substantially the same with the statute of New York.

1. Was the steamship *compelled* to take the pilot?

In the case of *The Maria*,* in which the *Liverpool Pilot Act* was largely considered, Dr. Lushington said: "*It never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid*, was not compulsory. . . . . Now the Liverpool Pilot Act provides for three cases: 1st. The case of vessels homeward bound; 2d. Of vessels outward bound; and lastly, of vessels lying at anchorage; and with reference to homeward bound vessels, it is provided in the twenty-fourth section of the act, that if the master refuses to take a pilot on board, he is liable to the payment of pilotage. There is, therefore, this distinction in the two cases: that in the case of a vessel at anchor, the taking of the pilot on board is perfectly optional with the master, but in the case of a homeward bound vessel, it is enjoined upon him by the provisions of the act, and if he refuses so to do, he is rendered liable to the payment of the pilotage dues. *This, in my opinion, amounts to compulsion to take such pilot on board*, and it was so held by the learned judges by whom the

* 1 W. Robinson, 95.

case of *Sidebotham* v. *Caruthers* was decided. What says Mr. Justice Le Blanc? 'It appears that the master was compellable to take the pilot on board, and it was in consequence of his misconduct that the vessel was placed in such a situation, that when the water left her, she fell upon her side, and thus the damage happened.' Without going further into the case, it is sufficient to observe, that Lord Ellenborough and Mr. Justice Bailey were of the same opinion, that the master was *compellable* to take the pilot on board."

Other authorities to the same effect might be referred to, but it is deemed unnecessary. The one we have cited is sufficient.

Suppose the New York statute, in the event of a refusal to take a pilot on board, instead of full pilotage had given the vessel or cargo to the pilot. Whether the amount to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact but in *the degree* of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is, that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined, and an obligation is imposed. The alternatives presented are to receive the pilot; or to refuse and take the consequences.

In this connection it is proper to consider the particular provisions of the New York statute. It enacts that the master "*shall take* a licensed pilot;" that in case of refusal, pilotage shall be paid, and that it shall be paid to the first pilot offering his services. Any person not holding a license under this act, or the law of New Jersey, who shall pilot or offer to pilot any vessel to or from the port of New York, by way of Sandy Hook, except such as are exempt by virtue of this act; or any master on board a steamtug who shall tow such vessel without a licensed pilot on board, shall be punished by a fine not exceeding one hundred dollars, or

imprisonment not exceeding sixty days; and all persons employing a person not licensed under this act, or the laws of New Jersey, are subjected to a penalty of one hundred dollars.

It was contended by the counsel for the appellee, that if the master had chosen to proceed without a pilot, he would have been liable only to the payment of pilotage; and that none of the other penal provisions of the statute, according to its true meaning, apply in such a case. We have not found it necessary to examine this subject. Giving to the statute either construction, it seems to us clear, in the light of both reason and authority, that the pilot was taken by the steamship upon compulsion.

2. This brings us to the examination of the second proposition. Does the fact that the law compelled the master to take the pilot, exonerate the vessel from liability?

The immunity of the wrongdoing vessel when the pilot is in charge, and alone in fault, is now well settled in English jurisprudence, both in the Admiralty Court and in the courts of common law. The rule must necessarily be the same in both. In such cases the liability of the ship and of the owner are convertible terms. The ship is not liable if the owners are not; and no responsibility can attach to the owners, if the ship is not liable to be proceeded against.*

Some of the leading English cases will be adverted to, according to the order of time in which they were determined.

The case of *The Neptune the Second*, was decided two years after the passage of the statute of 52 George III. In that case Sir William Scott said: "If the mere fact of having a pilot on board and acting in obedience to his directions, would discharge the owner from responsibility, I am of opinion that they would stand excused in the present case. I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this I conceive is not the *true rule of law*. The parties

* The Druid, 1 W. Robinson, 399.

who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount, as well as they can, against him. It cannot be maintained that the circumstance of having a pilot on board, and acting in conformity to his directions, can operate as a discharge of the responsibility of the owners." The statute is not adverted to in the case.

In *The Attorney-General* v. *Case*,* it was held by the Court of Exchequer that the case was to be determined under the Liverpool Pilot Act, and that the statute containing the clause of exemption did not apply; that the vessel being at anchor, it was optional with the master to take a pilot or not, and that the vessel was therefore liable. It was strongly intimated that if she had been under way, and the pilot had been taken under the Liverpool Act, there would have been no such compulsion as, upon general principles, would have exonerated the vessel from responsibility.

In *Caruthers* v. *Sidebotham*,† the Court of King's Bench held that the pilot was compulsorily taken, and that, independently of the statute giving the exemption, the vessel, upon general principles of municipal law, was not liable. *The Attorney-General* v. *Case* was referred to in the argument. The ruling of the court was in direct antagonism to the intimations in that case.

The Girolamo‡ was decided by Sir John Nichol. He held, among other things, that the provision in the 6 George IV, that "the act should not affect or impair the jurisdiction of the High Court of Admiralty," limited the operation of the clause of exemption to proceedings in *personam* in the common law courts, and left the admiralty jurisdiction to be exercised in all respects as if the exemption in the statute had not been enacted. The judgment is a very elabo-

* 3 Price, 303. † 4 Maule & Selwyn, 78. ‡ 3 Haggard, 169.

rate one. The vessel was held liable, although in charge of a licensed pilot at the time of the collision.

This case was followed by *The Baron Holberg*,* *The Gladiator*,† and *The Eolides*‡—decided by the same judge in the same way.

So the English law stood until the decision by Dr. Lushington in the case of *The Protector*.§ In that case the subject was examined with great care and fulness of research. The learned judge expressed the opinion that Sir William Scott had decided the case of *The Neptune the Second* in entire ignorance of the statute of 52 George III, ch. 39, and that the case, therefore, was not authority. He overruled the judgment of Sir John Nichol as to the effect of the jurisdiction clause of the statute, and held the true rule to be, that the statute took away the responsibility of the vessel whenever the accident was imputable to the fault of the pilot alone. The court found the fact so to be, and upon that ground dismissed the owner of the Protector from the suit.

In *The Maria*‖ the subject was again ably examined by the same admiralty judge. It was held that under the Newcastle Pilot Act the taking of a pilot by a foreign ship was compulsory, and that if damage occurred to another vessel by his default, the vessel which had taken him was not liable, both upon general principles and by virtue of the act of 5 George IV, ch. 55. The rule laid down by the Court of King's Bench in *Caruthers* v. *Sidebotham*,¶ was recognized and affirmed.

These judgments have stood unquestioned down to the present time. There have been numerous adjudications settling the construction of the statutory provision that the vessel shall be exonerated where the pilot is in fault.

The following propositions may be deduced from them:

The statute giving the immunity where a licensed pilot is employed, abridges the natural right of the injured party to compensation, and is therefore to be construed strictly.

* 3 Haggard, 244. † 3 Ib. 340. ‡ 3 Ib. 367.
§ 1 W. Robinson, 45 ‖ 1 Ib. 95. ¶ 4 Maule & Selwyn, 78.

The exemption applies only where the pilot is actually in charge of the vessel, and solely in fault.

If there be anything which concurred with the fault of the pilot, in producing the accident, the exemption does not apply, and the vessel, master, and owners are liable.

The colliding vessel is in all cases *primâ facie* responsible.

The burden of proof rests upon the party claiming the benefit of the exemption. He must show affirmatively that the pilot was in fault, and that there was no fault on the part of the officers or crew, "which might have been in any degree conducive to the damage."*

The last in the series of these authorities, to be considered, is *The Halley*.† The owners of a foreign ship sued the owners of an English ship in the British Court of Admiralty, claiming damages for a collision in Belgian waters. The defendants pleaded that by the Belgian law pilotage was compulsory. The plaintiffs replied, that by the same law the wrongdoing vessel was liable for the damages. The case turned upon the sufficiency of the latter proposition as an answer to the former.

Sir Robert Phillimore, following the case of *Smith* v. *Condry*, decided by this court,‡ and other authorities to which he referred, held that the rights of the parties were governed by the law of the place of the tort. In the course of his learned and elaborate opinion, he said:

"The English legislature has thought it expedient that only certain persons, under certain restrictions, shall be allowed to act as pilots in British waters; and that it shall be compulsory upon all masters of ships to place the navigation of their vessel under the control of one of these licensed pilots. And the common law of England has ruled, that in such cases *the natural responsibility of the owner of the vessel*, for injuries done to the property or persons of others,

* The Gen. De Caen, 1 Swabey, 10; The Diana, 1 W. Robinson, 135; The Protector, Ib. 60; The Christiana, 7 Moore, P. C. 171; The Minna, Law Rep. Ad. & Ecc. pt. 2, Nov. 1868, p. 97; The Iona, Law Reports, 1 Privy Council, 482.

† Law Reports, 1868, pt. 2, Ad. & Ecc. p. 8.

‡ 1 Howard, 28.

by the unskilful navigation of that vessel, shall cease, and be transferred to the pilot. This law holds, that the responsibility of the owner, for the acts of his servant, is founded upon the presumption that the owner chooses his servant, and gives him orders, which he is bound to obey; and that the acts of the servant, so far as the interests of third parties are concerned, must always be considered the acts of the owner. But no such presumptions, it is said, can exist in the case of compulsory pilotage, in which the State forces its own servant upon the owner, and, indeed, in some respects reverses the usual order of things on board ship, by rendering it incumbent on the master to obey the order of the pilot. But the considerations of domestic policy, which have created this peculiar law, *are not founded on principles of universal law or natural justice.* They are considerations of British policy, which apply to British waters and territory; but not Flushing waters, in which this collision took place. . . . . Lord Stowell's mind, furnished as it was with the principles of jurisprudence, rejected the argument for the immunity of the wrongdoing vessel. . . . *I will frankly say, that it appears to me difficult to reconcile the claims of natural justice* to the law which exempts the owner who has a licensed pilot on board, from all liabilities for the injuries done, by the bad navigation of the ship, to the property of an innocent owner. . . . No one acquainted with the working of this law, which exempts the wrongdoing vessel from liability in this court, can be ignorant that it is fruitful of injustice."

This survey of the English adjudications warrants several observations.

Lord Stowell, overlooking the statute, refused to recognize the principle of exemption. He held the "true rule of law" to be, that fault created liability, notwithstanding that the pilot was taken upon compulsion.

Sir John Nichol made a persistent effort to get rid of the statute by giving the jurisdiction clause a construction which annulled the operation of the exemption in the Admiralty Court.

Dr. Lushington and the Privy Council have held that the

exemption clause is to be strictly construed, and have given it a construction so narrow as greatly to limit its operation and impair its efficacy; while Sir Robert Phillimore pronounced its working in the Admiralty Court "fruitful of injustice," and more than intimates that it is contrary to the fundamental principles of natural right.

These results furnish little inducements to us to establish the principle in our jurisprudence.

The question is not a new one in this country. It arose as early as the year 1800, in *Bussy* v. *Donaldson.** In that case the court said:

"The legislative regulations were not intended to alter or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of the pilot, but to secure in favor of every person—strangers as well as residents—trading to our port, a class of experienced, skilful, and honest mariners, to navigate their vessels safely up the bay and the river Delaware. The mere right of choice is, indeed, one, but not the only reason why the law in general makes the master responsible for the acts of his servant—and, in many cases where the responsibillty is allowed to exist, the servant may not in fact be the choice of the master."

Williamson v. *Pierce*,† *Yates* v. *Brown*,‡ and *Denison* v. *Seymour*,§ involved the same principle, and were decided in the same way.

In the case of *The Creole*, decided by Mr. Justice Grier, on the circuit, in the year 1853,‖ the subject underwent a learned and thorough examination, both by counsel and the court. The result was the same as in *Bussy* v. *Donaldson*. It appears by that case, that Mr. Justice Wayne had ruled the point in the same way in his circuit. No American adjudication to the contrary has been brought to our attention.

The question is now, for the first time, presented in this court.

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* 4 Dallas, 206. † 4 Martin, N. S. 399. ‡ 8 Pickering, 23.
§ 9 Wendell, 1. ‖ 2 Wallace, Jr., 485.

The New York statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrongdoing vessel. Such a provision in a State law would present an important question, which, in this case, it is not necessary to consider.

The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent.*

The reasoning by which the application of this principle to the case before us is attempted to be maintained, is specious rather than solid. It is necessary that both outward and inward bound vessels, of the classes designated in the statute, should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed, by providing a body of trained and skilful seamen, at all times ready for the service, holding out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship. The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance. It is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all cases of great necessity.† The master has the same power to displace the pilot that he has to remove any

* Mulligan v. Wedge, 12 Adolphus & Ellis, 737; Redie v. Railway Company, 4 Exchequer, 244.

† The Argo, 1 Swabey, 464; The Christiana, 7 Moore P. C. 192.

subordinate officer of the vessel. He may exercise it or not, according to his discretion.

The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors.*

The maxim of the civil law—*sic utere tuo ut non lædas alienum*—may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment—especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. Unlike a common-law lien, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances.†

The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien.

All port regulations are compulsory. The provisions of

* The Phœbe, Ware, 273; The Creole, 2 Wallace, Jr., 519.

† The Bold Buccleugh, 7 Moore P. C. 284; Edwards v. The Steamer R. F. Stockton, Crabbe, 580; The American, 16 Law Reports, 264; The Lion, Law Rep., November, 1868, Ad. and Ecc. 107.

the statute of New York are a part of the series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation, and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. We think the rule which works this result is a wise and salutary one, and we feel no disposition to disturb it.

The steamship is a foreign vessel. We have, therefore, considered the learned and able argument of the counsel for the appellants with more care than we should otherwise have deemed necessary. Maritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case.

Mr. Justice CLIFFORD (with whom concurred Mr. Justice FIELD):

I concur in the proposition that the pilot laws of New York afford no defence to the appellants in this case, and that the decree of the Circuit Court, determining that the colliding steamship was liable, notwithstanding she had a licensed pilot on board, ought to be affirmed. Many English cases decide otherwise, but I am not satisfied with the reasons given in their support, and have no hesitation in concurring in the conclusion to which the majority of the court has come; but I do not concur in the proposition that the State laws which require inward or outward bound vessels to pay pilot fees or half pilot fees, whether they employ a pilot or not, would afford any such defence in a case of collision, even if it be admitted that a law imposing penalties, in case of a refusal to employ a licensed pilot, would have that effect. Whether the party charged is liable or not, aside from the merits, depends in all cases upon his relation to the wrongdoer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is

liable, and he is equally so, if the act constituting the fault was done by one towards whom he bore the relation of principal, but the liability ceases where the relation of principal entirely ceases to exist, as in case of inevitable accident. Unless the relation of principal entirely ceases to exist, the party owning the vessel remains liable in a suit *in personam.*

When a vessel is chartered, the liability of the owner, in respect to a collision happening in consequence of the faulty navigation of the ship, depends upon the inquiry whether or not the master and crew can be considered to be his servants. Settled rule is that where the ship-owner provides the vessel only, and the master and crew are selected by the charterer, the latter and not the ship-owner is responsible for their acts. But if the ship-owner provides not merely the vessel, but also selects the master and crew, he is still liable, in case of collision, to the owners of the injured vessel, because the vessel, in the sense of the maritime law, is under his control, though the wages of the master and crew may be paid by the charterer. Such liability in the former case is shifted from the real owner to the owner for the voyage; but the ship is as much liable in the one case as in the other to a suit *in rem* for the injury committed, because she sailed on the voyage as the property of the real owner and by his consent.

Port regulations are supposed to be known to the ship-owner before he sends his vessel on the voyage, and the rule of the maritime law is, that in sending her to any particular port he elects to submit to the lawful regulations established at that port, and that his vessel shall be responsible in case she unlawfully collides with another vessel engaged in lawful navigation. Contrary to the rule adopted in the English admiralty, the American courts have so held without an exception which has fallen under my observation.*

All of these cases decide that the State statutes requiring

* The Carolus, 2 Curtis, 2269; The Hallock, 1 Sprague, 539; Bussy *v.* Donaldson, 4 Dallas, 206; Yates *v.* Brown, 8 Pickering, 23; Williamson *v.* Price, 4 Martin, N. S. 399; Dennison *v.* Seymour, 9 Wendell, 1; Smith *v.* Condrey, 1 Howard, 28; The Lotty, Olcott, 329; The Creole, 2 Wallace, Jr., 511; The Rescue, 2 Sprague, 16.

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the master to take a licensed pilot and making provision for the payment of pilot fees, do not amount to a compulsion to take a pilot, and I am satisfied they are correct, and that such a statute cannot be set up as exempting a ship from responsibility while navigated by a licensed pilot.

Believing those decisions to be correct, I cannot consent to pronounce them incorrect, especially as no such conclusion is necessary to the right disposition of the present case. Neither the common law courts nor the courts of admiralty, in this country, have adopted the rule established by Dr. Lushington. On the contrary, they all have held that the State laws requiring the master to pay pilot fees, whether he employed a pilot or not, did not compel him to surrender the navigation of his ship to the licensed pilot, or prevent him from continuing in the command of his ship. Dissenting as I do from the rule laid down in the English courts, I concur with the majority of the court in overruling those decisions as applied to our jurisprudence, but I cannot concur in overruling the American decisions which assert the opposite doctrine, because I believe they are correct.

DECREE AFFIRMED.

LANE COUNTY v. OREGON.

1. An enactment in a State statute that "the sheriff shall pay over to the county treasurer the full amount of the State and school taxes, in gold and silver coin," and that "the several county treasurers shall pay over to the State treasurer the State tax, in gold and silver coin," requires by legitimate, if not necessary consequence, that the taxes named be *collected* in coin. But if, in the judgment of this court, this were otherwise, yet the Supreme Court of the State having held this construction to be correct, this court will follow their adjudication.
2. The clauses in the several acts of Congress, of 1862 and 1863, making United States notes a legal tender for debts, have no reference to taxes imposed by State authority.

ERROR to the Supreme Court of Oregon. The case was this:

Congress, February, 1862, authorized the issue of $150,-

000,000 in notes of the United States, and enacted that they should "be receivable in payment of all taxes, internal duties, levies, debts, and demands due to the United States, except duties on imports; and of all claims and demands of any kind whatever *against the United States*, except interest on bonds and notes, which shall be paid in coin; and shall also be lawful money and legal tender in payment of all *debts*, public and private, within the United States, except duties on imports." A subsequent act, authorizing a further issue, contained an enactment very similar, as to the legal characteristics of the notes, when issued. A third act, authorizing a yet further issue, enacted simply that they should be lawful money or a legal tender. Under these three acts, a large amount of notes of the United States, which circulated as money, were issued.

Subsequently to this, the legislature of Oregon passed a statute, enacting that "the sheriff shall pay over to the county treasurer, the full amount of the *State and school taxes*, in *gold and silver coin*;"* and that "the several county treasurers shall pay over to the State treasurer the *State tax in gold and silver coin*."†

In this condition of statute law, Federal and State, the State of Oregon, in April, 1865, filed a complaint against the County of Lane, in the Circuit Court of the State for that county, to recover $5460.96, *in gold and silver coin*, which sum was alleged to have become due, as State revenue, from the county to the State, on the first Monday of February, 1864.

To this complaint an answer was put in by the county, alleging a tender of the amount claimed by the State, made on the 23d day of January, 1864, to the State treasurer, at his office, in *United States notes*, and averring that the lawful money, so tendered and offered, was, in truth and fact, part of the first moneys collected and paid into the county treasury, after the assessment of taxes for the year 1862.

To this answer there was a demurrer, which was sustained

* Statutes of Oregon, 438, § 82.

† Ib. 441, § 46.

by the Circuit Court, and judgment was given that the plaintiff recover of the defendant the sum claimed, in gold and silver coin, with costs of suit. This judgment was affirmed, upon writ of error, by the Supreme Court of the State.

The case was now brought here by writ of error to that court.

Mr. Williams, for Lane County, plaintiff in error, laid down and pressed upon the attention of the court, seeking to maintain them by argument and authority, these two propositions:*

1st. That the laws of Oregon did not require the collection, in coin, of the taxes in question, and that the treasurer of the county could not be required to pay the treasurer of the State any other money than that in which the taxes were actually collected.

2d. That the tender of the amount of taxes made to the treasurer of the State, by the treasurer of the county, in United States notes, was warranted by the acts of Congress authorizing the issue of these notes, and that the law of the State, if it required collection and payment in coin, was repugnant to these acts, and therefore void.

Mr. Johnson (a brief of Mr. Mallory being filed), contra.

The CHIEF JUSTICE delivered the opinion of the court.

Two propositions have been pressed upon our attention, ably and earnestly, in behalf of the plaintiff in error.

The first of them will be first considered.

The answer avers, substantially, that the money tendered was part of the first moneys collected in Lane County after the assessment of 1863, and the demurrer admits the truth of the answer.

The fact therefore may be taken as established, that the

* He cited Bouvier's Law Dictionary, title "Debt;" Multnomah County *v.* The State, 1 Oregon, 358; Rhodes *v.* Farrell, 2 Nevada, 60; Ohio *v.* Hibbard, 8 Ohio, 63; Same *v.* Gazlay, 5 Id. 14; Appleton *v.* Hopkins, 5 Gray, 530; Blackstone's Commentaries, 160.

taxes for that year, in Lane County, were collected in United States notes.

But was this in conformity with the laws of Oregon?

In this court the construction given by the State courts to the laws of a State, relating to local affairs, is uniformly received as the true construction; and the question first stated must have been passed upon in reaching a conclusion upon the demurrer, both by the Circuit Court for the county and by the Supreme Court of the State. Both courts must have held that the statutes of Oregon, either directly or by clear implication, required the collection of taxes in gold and silver coin.

Nor do we perceive anything strained or unreasonable in this construction. The laws of Oregon, as quoted in the brief for the State, provided that "the sheriff shall pay over to the county treasurer the full amount of the State and school taxes, in gold and silver coin;" and that "the several county treasurers shall pay over to the State treasurer the State tax, in gold and silver coin."

It is certainly a legitimate, if not a necessary inference, that these taxes were required to be collected in coin. Nothing short of express words would warrant us in saying that the laws authorized collection in one description of money from the people, and required payment over of the same taxes into the county and State treasuries in another.

If, in our judgment, however, this point were otherwise, we should still be bound by the soundest principles of judicial administration, and by a long train of decisions in this court, to regard the judgment of the Supreme Court of Oregon, so far as it depends on the right construction of the statutes of that State, as free from error.

The second proposition remains to be examined, and this inquiry brings us to the consideration of the acts of Congress, authorizing the issue of the notes in which the tender was made.

The first of these was the act of February 25, 1862, which authorized the Secretary of the Treasury to issue, on the

credit of the United States, one hundred and fifty millions of dollars in United States notes, and provided that these notes "shall be receivable in payment of all taxes, internal duties, excises, debts and demands due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except interest on bonds and notes, which shall be paid in coin; and shall also be lawful money and legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The second act contains a provision nearly in the same words with that just recited, and under these two acts two-thirds of the entire issue was authorized. It is unnecessary, therefore, to refer to the third act, by which the notes to be issued under it are not in terms made receivable and payable, but are simply declared to be lawful money and a legal tender.

In the first act no emission was authorized of any notes under five dollars, nor in the other two of any under one dollar. The notes, authorized by different statutes, for parts of a dollar, were never declared to be lawful money or a legal tender.*

It is obvious, therefore, that a legal tender in United States notes of the precise amount of taxes admitted to be due to the State could not be made. Coin was then, and is now, the only legal tender for debts less than one dollar. In the view which we take of this case, this is not important. It is mentioned only to show that the general words "all debts" were not intended to be taken in a sense absolutely literal.

We proceed then to inquire whether, upon a sound construction of the acts, taxes imposed by a State government upon the people of the State, are debts within their true meaning.

In examining this question it will be proper to give some attention to the constitution of the States and to their relations as United States.

* 12 Stat. at Large, 592; Ib. 711.

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: "The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."

Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments. Under the Articles of Confederation the government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong ex-

clusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress. If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly,

a reasonable conclusion that Congress did not intend, by the general terms of the currency acts, to restrain the exercise of this power in the manner shown by the statutes of Oregon.

Other considerations strengthen this conclusion. It cannot escape observation that the provision intended to give currency to the United States notes in the two acts of 1862, consists of two quite distinguishable clauses. The first of these clauses makes those notes receivable in payment of all dues to the United States, and payable in satisfaction of all demands against the United States, with specified exceptions; the second makes them lawful money, and a legal tender in payment of debts, public and private, within the United States, with the same exceptions.

It seems quite probable that the first clause only was in the original bill, and that the second was afterwards introduced during its progress into an act. However this may be, the fact that both clauses were made part of the act of February, and were retained in the act of July, 1862, indicates clearly enough the intention of Congress that both shall be construed together. Now, in the first clause, taxes are plainly distinguished, in enumeration, from debts; and it is not an unreasonable inference, that the word debts in the other clause was not intended to include taxes.

It must be observed that the first clause, which may be called the receivability and payability clause, imposes no restriction whatever upon the States in the collection of taxes. It makes the notes receivable for national taxes, but does not make them receivable for State taxes. On the contrary, the express reference to receivability by the national government, and the omission of all reference to receivability by the State governments, excludes the hypothesis of an intention on the part of Congress to compel the States to receive them as revenue.

And it must also be observed that any construction of the second, or, as it may well enough be called, legal-tender clause, that includes dues for taxes under the words debts, public and private, must deprive the first clause of all effect whatever. For if those words, rightly apprehended, include

State taxes, they certainly include national taxes also; and if they include national taxes, the clause making them receivable for such taxes was wholly unnecessary and superfluous.

It is also proper to be observed, that a technical construction of the words in question might defeat the main purpose of the act, which, doubtless, was to provide a currency in which the receipts and payments incident to the exigencies of the then existing civil war might be made.

In his work on the Constitution, the late Mr. Justice Story, whose praise as a jurist is in all civilized lands, speaking of the clause in the Constitution giving to Congress the power to lay and collect taxes, says, of the theory which would limit the power to the object of paying the debts, that, thus limited, it would be only a power to provide for the payment of debts *then existing*.* And certainly, if a narrow and limited interpretation would thus restrict the word debts in the Constitution, the same sort of interpretation would, in like manner, restrict the same word in the act. Such an interpretation needs only to be mentioned to be rejected. We refer to it only to show that a right construction must be sought through larger and less technical views. We may, then, safely decline either to limit the word debts to existing dues, or to extend its meaning so as to embrace all dues of whatever origin and description.

What then is its true sense? The most obvious, and, as it seems to us, the most rational answer to this question is, that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this.

We are the more ready to adopt this view, because the

* 1 Story on the Constitution, 689, § 921.

greatest of English elementary writers upon law, when treating of debts in their various descriptions, gives no hint that taxes come within either;* while American State courts, of the highest authority, have refused to treat liabilities for taxes as debts, in the ordinary sense of that word, for which actions of debt may be maintained.

The first of these cases was that of *Pierce* v. *The City of Boston*,† 1842, in which the defendant attempted to set off against a demand of the plaintiff certain taxes due to the city. The statute allowed mutual debts to be set off, but the court disallowed the right to set off taxes. This case went, indeed, upon the construction of the statute of Massachusetts, and did not turn on the precise point before us; but the language of the court shows that taxes were not regarded as debts within the common understanding of the word.

The second case was that of *Shaw* v. *Pickett*,‡ in which the Supreme Court of Vermont said, "The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding *in invitum*."

The next case was that of the *City of Camden* v. *Allen*,§ 1857. That was an action of debt brought to recover a tax by the municipality to which it was due. The language of the Supreme Court of New Jersey was still more explicit: "A tax, in its essential characteristics," said the court, "is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the State. It is not founded on contract or agreement. It operates *in invitum*. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts express or implied."

These decisions were all made before the acts of 1862 were passed, and they may have had some influence upon the choice of the words used. Be this as it may, we all think that the interpretation which they sanction is well warranted.

* 1 Blackstone's Comm. 475, 6.
† 8 Metcalf, 520.
‡ 26 Vermont, 486.
§ 2 Dutcher, 398.

We cannot attribute to the legislature an intent to include taxes under the term debts without something more than appears in the acts to show that intention.

The Supreme Court of California, in 1862, had the construction of these acts under consideration in the case of *Perry* v. *Washburn.** The decisions which we have cited were referred to by Chief Justice Field, now holding a seat on this bench, and the very question we are now considering, "What did Congress intend by the act?" was answered in these words: "Upon this question we are clear that it only intended by the terms debts, public and private, such obligations for the payment of money as are founded upon contract."

In whatever light, therefore, we consider this question, whether in the light of the conflict between the legislation of Congress and the taxing power of the States, to which the interpretation, insisted on in behalf of the County of Lane, would give occasion, or in the light of the language of the acts themselves, or in the light of the decisions to which we have referred, we find ourselves brought to the same conclusion, that the clause making the United States notes a legal tender for debts has no reference to taxes imposed by State authority, but relates only to debts in the ordinary sense of the word, arising out of simple contracts or contracts by specialty, which include judgments and recognizances.†

Whether the word debts, as used in the act, includes obligations expressly made payable, or adjudged to be paid in coin, has been argued in another case. We express at present, no opinion on that question.‡

The judgment of the Supreme Court of Oregon must be

AFFIRMED.

* 20 California, 350. † 1 Parsons on Contracts, 7.

‡ See *infra*, pp. 229, 258, Bronson v. Rodes, and Butler v. Horwitz.

AURORA CITY *v.* WEST.

1. In a case having long and complicated pleadings, where a second count of a declaration has been left by the withdrawal of a plea without an answer, so that judgment might have been had on it by *nil dicit*, a superior court will not, on error, infer, as of necessity, that a judgment below for the plaintiff was thus given; the case being one where, after such withdrawal, there were numerous demurrers, pleas, replications, and rejoinder, arising from a first count, and the proceedings showing that these were the subject of controversy. The second count will be taken to be waived.
2. A reversal in a court of last resort, *remanding a case*, cannot be set up as a bar to a judgment in an inferior court on the same case.
3. The rule that judgment will be given against the party who commits the first fault in pleading, does not apply to faults of mere form.
4. The plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it.
5. Interest warrants or coupons, in a negotiable form, draw interest after payment of them is unjustly neglected or refused.

ERROR to the Circuit Court for Indiana; the case being this:

The charter of the city of Aurora authorized its council, whenever a majority of its qualified voters required it, to take stock in any chartered company for making "roads" *to* that city, and to make and *sell* their bonds to pay for it. With this power the city, in 1852, issued $50,000 of bonds to the Ohio and Mississippi Railroad Company; a company whose charter authorized it to survey, locate, and construct a railroad "on the most direct and practicable route" between Lawrenceburg on the Ohio and Vincennes on the Wabash. The bonds recited that they were issued in payment of a subscription to stock in the Ohio and Mississippi Railroad Company, made by the city by order of the common council, in pursuance of its charter.

The bonds all passed from the company to West & Torrence, and the interest, due January 1st, 1856, not being paid, these persons brought suit on them at May Term, 1856, in the Dearborn County Court of Indiana, for payment.

The declaration alleged that the city, under the authority of its charter, subscribed for $50,000 of the stock of the company; that the company was chartered to construct, and was then constructing, a railroad to the said city; that a majority of the qualified voters had assented to the subscription; that the city *issued and sold* the bonds to raise the funds to pay for the stock, and that the plaintiffs *purchased* them.

The city pleaded: 1. That the location of the railroad was not established through the city till after the subscription. 2. That the company was not chartered to construct, and was not, at the date of the subscription, constructing a railroad *to* the city.

To the first plea the plaintiffs demurred, and the demurrer was sustained; and to the second they replied, that the company located their railroad through the city before the bonds were delivered.

The defendants demurred to the replication, but the court overruled the demurrer.

The concluding statement of the record was that "the said city, not desiring to controvert the facts stated in said reply, but admitting the same," judgment was rendered for the plaintiffs.

Other sets of coupons subsequently falling due, West & Torrence, at May Term, 1861, brought suit on them in the same Dearborn Court, on pleadings much the same as the other, and obtained judgment against the city. This judgment was *reversed* for error, in the Supreme Court of Indiana, and the cause *remanded*.

Subsequent sets of coupons being unpaid, West & Torrence brought suit on them in the Circuit Court of the United States for Indiana.

The declaration in this third suit recited, "for that whereas" the city, by virtue of power given in its charter, had lawfully, and in due form, "and *for a valuable consideration*," executed and issued the bonds, and that the plaintiffs, "*for a valuable consideration* had become the legal holders, and owners, and bearers" of them, and the city had refused to pay, a right of action had accrued. The city demurred, as-

signing for cause, that the declaration did not allege that the bonds were issued in pursuance of such a vote of the inhabitants of the city as the charter required.

The court overruled the demurrer and gave judgment against the city.

A yet still additional series of coupons falling due, West & Torrence brought the suit which was now here by error. The declaration contained a special count (much as in the preceding cases), and the common counts. Separate demurrers were filed to the respective counts, but were overruled and withdrawn. The general issue, called in the record the first plea, was also pleaded and subsequently withdrawn; the second count being then left without answer.

Seven special pleas, numbered from two to eight, inclusive, were pleaded to the special count.

The 2d alleged that the bonds *were issued without any good or valuable consideration.*

The 3d, that they were void, because the company was not chartered to construct a railroad *to* the city.

The 4th, because a majority of the qualified voters of the city had not signified their assent, &c.

The 5th, because the railroad company was not chartered to make a road *to* the city.

The 6th, because the subscription was made and the bonds issued before the road was located to the city, and before the railroad company had resolved to make such location.

The 7th, because the stock, before its issue to the defendants, became wholly worthless through the mismanagement of the directors.

The 8th, because the proper officers of the city never sold and delivered the bonds as required by law, and the company obtained them without such sale and without authority.

Notice to the plaintiffs was alleged of all these facts.

Of replications not withdrawn, the first, which was to the second plea, set up the judgment, May Term, 1856, of the Court for Dearborn County.

The 2d was to all the pleas except the 1st, and set up the judgment in the Circuit Court of the United States.

Argument for the plaintiff in error.

The 5th was to the 3d, 4th, 5th, 6th, 7th, and 8th pleas; and also set up the judgment in the Court of Dearborn County, as described in the first replication.

The 6th was to the 4th plea, and set up the same judgment.

The 8th was also to the 4th plea, and set up that the defendants were estopped by the recital in the bonds from denying that a majority of the qualified voters of the city had assented to the subscription.

The 10th was to the 3d, 5th, and 6th pleas, and set up certain proceedings of the city council, therein recited, as an answer to the said several pleas.

The city demurred specially to each of the replications; but the court overruled the demurrer, and the defendants filed a rejoinder to the 2d replication, the rejoinder being the judgment recovered in the Court of Dearborn County, at May Term, 1861, and that the Supreme Court of the State, on appeal, had reversed it for error, and remanded the cause.

The rejoinder, by agreement, was to be regarded as pleaded to all the replications adjudged good except the 10th.

The rejoinder being held bad on demurrer the parties waived a jury, and submitted the cause to the court for the assessment of damages, and the court, having heard the evidence, gave judgment for the plaintiffs. Upon which the defendants took a bill of exceptions.

Mr. Lincoln, for the City, plaintiff in error:

1. The plaintiffs seek to set up the judgments, in the Dearborn County Court, as an estoppel; but the Supreme Court of Indiana, having sustained the defences in this suit, between these parties, the plaintiffs below cannot so use that case. We have an estoppel against an estoppel. This opens the whole matter, and sets it at large.

Independently of this, the replications are so manifestly irregular that, as being the first fault in the pleading, we are entitled to judgment.

2. But without pressing these technical matters, the second

plea distinctly avers that the bonds were issued without any consideration, and that this fact was known to the plaintiffs when they received them. Now certainly, neither in the Dearborn County Court case, nor in that in the Federal court in Indiana, was the *bona fides* of the bonds put *in issue, contested, and determined.* Both cases went off upon demurrer. The whole history is matter of record; and an examination of the records, and a comparison of them with the record in this suit, will show that this is as we here assert. The demurrer did not cover all the facts involved in this suit. A recital is not an averment or allegation. Now the plea of *res judicata* is a plea of estoppel, and requires the highest degree of certainty. It cannot be aided by inference. It holds good only in those cases where the identical *point in dispute*, in the case wherein it is pleaded, was put in issue, contested, and determined upon in the former suit.

It may be stated as a matter of fact, that the want of *bona fides* in the issue was not known to the city until lately. It neither was nor could have been put in issue.

3. The coupons having been themselves for interest ought not to bear interest; the compounding of interest as against a debtor not being favored.

Mr. Stanbery, who filed a brief for Mr. Mitchell, contra:

1. There is nothing to show that the judgment below was not rendered on the second count. To it there was no plea; and a demurrer had been withdrawn. Certainly judgment might have been rendered by *nil dicit.*

2. The Supreme Court of Indiana "remanded" the cause for further proceedings. The case, as an estoppel against an estoppel, thus comes to nothing.

3. The want of *bona fides*, now rested on, was, if existing in fact, a matter connected with the very origin of these things. It might, and, if meant to be relied on at all, ought to have been pleaded in the earlier suits. A party having divers defences to the same instruments has no right to present but one at a time, take his chance on trial with that one, and, if he fail on that trial, bring up his reserves, *sin-*

gulatim, in this way. If that were allowable, a party might keep his case open forever. The rule may be different in regard to a defence occurring since the last trial, or as to one of which the defendant could not possibly have then had knowledge. Nothing of that sort appears, or can be now asserted here. The case is on pleadings.

But we think that the *bona fides* of the issue of the bonds was involved in the former suits. The declaration in one of them recites expressly "the valuable consideration" in the case. Indeed, it was essential under any circumstances to prove that the city did execute and deliver the bonds for a valuable consideration. The plaintiffs could not have got along otherwise. This is sufficient, and the fact of consideration must be therefore taken to be established by the judgments.

4. The interest on the coupons was rightly given; interest being, properly enough given, on a debt due, demanded, and withheld.

Mr. Justice CLIFFORD delivered the opinion of the court.

Fifty bonds, of one thousand dollars each, were issued by the corporation defendants on the first day of January, 1852, in payment of a subscription of fifty thousand dollars, previously made by the order of the common council of the city, to the capital stock of the Ohio and Mississippi Railroad Company. Authority to subscribe for such stock, and to issue such bonds, under the conditions therein specified, is conferred upon the corporation by the eighteenth section of their charter. Said bonds were negotiable, and were made payable in twenty-five years from date, with interest at six per cent. per annum. Interest warrants, or coupons, were attached to the several bonds, for the payment of each year's interest, till the principal of the bonds should fall due.

Plaintiffs became the holders for value of all of the bonds, together with the coupons thereto attached, and the defendants having neglected and refused to pay the interest for the three years specified in the record, the plaintiffs brought an

action of assumpsit, to recover the amount of the unpaid interest, as represented in the respective coupons for those years. Their claim was set forth in the declaration in a special count, alleging the substance of the facts as above stated, and the declaration also contained a second count for goods sold and delivered, which also embraced the common counts. Separate demurrers were filed to the respective counts, but they were overruled by the court, and were afterwards withdrawn by the defendants. They also pleaded the general issue, called, in the record, the first plea, which was subsequently withdrawn.

Seven special pleas, numbered from two to eight, inclusive, were also filed by the defendants to the special count, but the withdrawal of the general issue left the second count without any answer.

Second plea alleged that the bonds and coupons described in the special count, were issued without any good or valuable consideration.

Third plea alleged that the corporation was not authorized to issue the bonds to the railroad company, because the company was not chartered to construct a railroad to the city.

Fourth plea alleged that a majority of the qualified voters of the city did not, at an annual election, signify their assent to the making of the subscription to the stock, as required by law.

Fifth plea alleged that the bonds and coupons were null and void, because the railroad company was not a company chartered to make a road to said city.

Sixth plea alleged that the bonds and coupons were null and void, because the subscription to the stock was made, and the bonds and coupons were issued, before the road was located to the city, and before the railroad company had determined to make the location.

Seventh plea alleged that the bonds and coupons were null and void, because the stock of the company, before it was issued to the defendants, became of no value through the mismanagement of the directors, and was wholly worthless.

Eighth plea alleged that the bonds and coupons were null and void, because the proper officers of the city never sold and delivered them, as required by law, but that the company obtained the possession of the same without such sale, and without authority.

Notice to the plaintiffs of the respective defences, so pleaded, is alleged in each of the several pleas. Six only, of the eighteen replications filed by the plaintiffs, remain to be examined, as all the rest of the series were subsequently withdrawn without objection, or were held to be bad on demurrer.

Those not withdrawn, are the first, second, fifth, sixth, eighth, and tenth of the series, as appears by a careful inspection of the transcript. Of these, the first was to the second plea, and set up a former judgment rendered in favor of the plaintiffs, May Term, 1856, of the Circuit Court for the County of Dearborn, in the State of Indiana, in a certain action brought by the plaintiffs against the defendants, to recover the amount of the coupons attached to the same fifty bonds, which fell due the first day of January next preceding the rendition of the judgment, and the plaintiffs prayed judgment, if the defendants ought to be admitted to aver against that record, that the bonds and coupons were issued without any good or valuable consideration.

Second replication was to all the pleas, except the first, and set up a former judgment recovered by the plaintiffs, May Term, 1857, in the Circuit Court of the United States for the District of Indiana, in an action of assumpsit, against the defendants, for the amount of another set of the coupons attached to the same fifty bonds.

Fifth replication was to the third, fourth, fifth, sixth, seventh, and eighth pleas, and also set up the judgment recovered in the Circuit Court of Dearborn County, as described in the first replication, and substantially in the same form.

Sixth replication was to the fourth plea only, and set up the same judgment, and in the same form as pleaded in the fifth replication.

Eighth replication was also to the fourth plea, and alleged that the defendants were estopped, by the recital in the bonds, from denying that a majority of the qualified voters of the city, at an annual election, signified their assent to the subscription.

Tenth replication was to the third, fifth, and sixth pleas, and set up the proceedings of the city council therein recited, as an answer to the said several pleas.

Defendants demurred specially to each of the several replications, but the court overruled the respective demurrers, and held that the several replications were sufficient.

Leave was granted to the defendants, at the same time, to rejoin, and on a subsequent day they appeared and filed a rejoinder to the second replication.

Parties also filed an agreement, at the same time, to the effect that the rejoinder should be regarded as pleaded to all the replications adjudged good, except the tenth, which was the second replication to the third, fifth, and sixth pleas.

Substance and effect of the matters alleged in the rejoinder were, that the plaintiffs recovered another judgment against the defendants in the Circuit Court for said Dearborn County, in a suit founded on another and different set of the coupons attached to the same fifty bonds, and that the Supreme Court of the State, on appeal, reversed the judgment for error, and remanded the cause for further proceedings.

Plaintiffs demurred to the rejoinder, and the court sustained the demurrer, and held that the rejoinder was bad. Thereupon the parties waived a jury, and submitted the cause to the court for the assessment of damages, and the court, having heard all the evidence introduced by the parties, rendered judgment for the plaintiffs in the sum of ten thousand five hundred and thirty-four dollars and fifty cents damages, and costs of suit.

1. Judgment having been rendered for the plaintiffs, the defendants tendered a bill of exceptions, which was allowed by the presiding justice, and signed and sealed. Statement in the bill of exceptions is, that the parties submitted the

cause to the court upon the record and the evidence therein set forth; but it is obvious that, when it was submitted, there was nothing left to be done except to compute the damages.

None of the pleadings terminated in issues of fact, except such as had been withdrawn or waived by one side or the other, and all the issues of law had been determined against the defendants. When the defendants withdrew the general issue, and left the second count in the declaration without any answer, the plaintiffs, as upon *nil dicit*, might have moved for judgment for the want of a plea, but they did not submit any such motion, and both parties proceeded thereafter throughout the trial as if there was but one count in the declaration.*

Viewed in the light of the proceedings in the suit, subsequent to the withdrawal of the general issue, it must be understood that the second count was waived, as there is not a word in the record to support the proposition assumed by the plaintiffs, that the judgment was rendered on that count.

2. Every issue of fact having been withdrawn, and every issue of law in which the other pleadings terminated having been decided in favor of the plaintiffs, they were clearly entitled to judgment on the first count. Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below, in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth, and eighth replications of the plaintiffs.

Such being the state of the case the decisions of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends.†

* Hogan v. Ross, 18 Howard, 178; 1 Chitty's Archbold's Practice (11th ed.), 288; 1 Tidd's Practice, ed. 1856, 563; Stephen on Pleading, 108; Bisbing v. Albertson, 6 Watts & Sergeant, 450; Cross v. Watson, 6 Blackford, 130.

† Suydam v. Williamson et al., 20 Howard, 436; Gorman et al. v. Lenox, 15 Peters, 115.

3. Examination of the questions growing out of the decision of the court below in sustaining the demurrer to the defendants' rejoinder will first be made, because if the objections taken to that decision are overruled, the questions involved in the other decision will be of no importance, as the plaintiffs in any event must prevail, and the judgment of the Circuit Court must be affirmed. They must prevail in that event, because the several replications to which that rejoinder was filed, as extended and applied by the agreement of the parties, furnish a complete answer to all the special pleas of the defendants.

Before proceeding to consider the questions growing out of that decision of the court below, it should be remembered that the defendants, in filing the rejoinder, waived their demurrers to all the replications to which it was filed. Applied as it was by the agreement, to all the replications not abandoned, except the tenth, it follows that all the demurrers except that filed to the tenth replication were waived.

Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer, and when a defendant files a rejoinder to a replication, previously adjudged good on demurrer, his act in pleading over must for the same reason be held to have the same effect.*

4. Extended argument to show that the matters alleged in the rejoinder are not of a character to constitute a sufficient answer to the several replications to which it was filed is unnecessary, as it is scarcely so contended by the defendants. Undoubtedly the view of the pleader was to set up an estoppel against the matters pleaded by the plaintiffs in their first, second, fifth, sixth, and eighth replications, and to claim the benefit of the rule that an estoppel against an estoppel opens up the whole matter and sets it at large; but the insuperable difficulty in the way of the attempt to apply that rule, even supposing that the former judgments are pleaded as technical estoppels, is that the matters pleaded in the re-

* United States v. Boyd, 5 Howard, 29; Jones v. Thompson, 6 Hill, 621; Clearwater v. Meredith, 1 Wallace, 42.

joinder do not amount to an estoppel, as they merely show that the judgment for the plaintiff, as recovered in that case in the court of original jurisdiction, was reversed in the appellate tribunal, and that the cause was remanded to the subordinate court for further proceedings. Second trials often result in the same way as the first, and certainly the reversal of the judgment under the circumstances shown in the allegations of the rejoinder is not conclusive evidence that the plaintiffs may not ultimately recover. Unless a final judgment or decree is rendered in a suit the proceedings in the same are never regarded as a bar to a subsequent action. Consequently where the action was discontinued, or the plaintiff became nonsuit, or where from any other cause, except perhaps in the case of a *retraxit*, no judgment or decree was rendered in the case, the proceedings are not conclusive.*

5. Suppose the rejoinder is bad, still the defendants contend that the replications to which it was filed, are also bad, and that they are entitled to judgment, as the first fault in pleading was committed by the plaintiffs. Doubts were entertained at first whether, inasmuch as the demurrers were abandoned after the replications had been adjudged good, the point was open to the defendants; but the better opinion is, that the waiver of the demurrers left the rights of the parties in the same condition as they would have been if the demurrers had never been filed. Conceding that to be the rule, then it is clear that the defendants may go back and attack the sufficiency of the replications, as it is the settled rule of law in this court in respect to demurrers, that although the pleadings demurred to may be bad, the court will nevertheless give judgment against the party whose pleading was first defective in substance.†

* Wood v. Jackson, 8 Wendell, 9; Reed v. Locks and Canals, 8 Howard, 274; Rex v. St. Anne, 9 Q. B. 884; Greeley v. Smith, 1 W. & M. 181; Knox v. Waldoborough, 5 Maine, 185; Hull v. Blake, 13 Massachusetts, 155; Sweigart v. Berk, 8 Sergeant & Rawle, 305; Bridge v. Sumner, 1 Pickering, 371; 2 Taylor on Evidence, 1528; Harvey v. Richards, 2 Gallison, 231; Ridgely v. Spencer, 2 Binney, 70.

† Cooke v. Graham, 3 Cranch, 229; Sprigg v. Bank of Mount Pleasant, 10 Peters, 264; United States v. Arthur, 5 Cranch, 261; Clearwater v. Mere-

Statement of the rule by Stephen is, that on demurrer to the replication, if the court think the replication bad, but perceive a *substantial* fault in the plea, they will give judgment, not for the defendant but for the plaintiff, provided the declaration be good; but if the declaration also be bad in *substance*, then upon the same principle judgment would be given for the defendant.*

Apart, therefore, from their own demurrers, and solely by virtue of the plaintiffs' demurrer to their rejoinder, the defendants may go back and attack the plaintiffs' replications, but they can do so only as to defects of substance, as it is well settled that the rule applies only where the antecedent pleading is bad in substance, and that it does not extend to mere matters of form.† Mere formal objections, therefore, to the replications, will not be noticed, as such objections are not open under the pleadings in this record.

6. Four of the replications set up the two former judgments, and as they involve the same questions, they will all be considered together. Duly exemplified copies of those judgments are exhibited in the transcript, and they are well described in the replications. When the record of a former judgment is set up as establishing some collateral fact involved in a subsequent controversy, it must be pleaded strictly as an estoppel, and the rule is, that such a pleading must be framed with great certainty, as it cannot be aided by any intendment. Technical estoppels, as contended by the defendants, must be pleaded with great strictness, but when a former judgment is set up, in bar of an action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the

dith, 1 Wallace, 88; 1 Chitty's Pleadings, 668; Gorman v. Lenox, 15 Peters, 115.

* Stephen on Pleading, 148; Mercein v. Smith, 2 Hill, 210; Matthewson v. Weller et al., 3 Denio, 52; Townsend v. Jemison, 7 Howard 706.

† Tubbs v. Caswell et al., 8 Wendell, 129; Bushell v. Lechmore, 1 Ld. Raymond, 869.

matters alleged in the antecedent pleading of the opposite party.*

Same rule applies to a replication as to a plea, as the plaintiff cannot anticipate what the defence will be when he frames his declaration. Cases arise, also, where the record of the former suit does not show the precise point which was decided in the former suit, or does not show it with sufficient precision, and also where the party, relying on the former recovery, had no opportunity to plead it; but it is not necessary to consider those topics, as no such questions are directly presented in this case for decision.

Aside from all these questions, and independent of the form of the replications, the defendants make two objections to the theory, that the former judgments, set up in this case, are a conclusive answer to the respective defences pleaded in their several special pleas.

First. They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents substantially the same questions as those determined in the former suit. Where the second suit presents no new question, they concede that the judgment in the former suit, though rendered on demurrer, may be a bar to the second suit, but they maintain that it can never be so regarded, unless all those conditions concur.

Secondly. They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties for the same cause of action, except as to the precise point or points *actually* litigated and determined in the antecedent trial; and they insist that none of the defences set up in their several special pleas were directly presented and determined in either of the former suits, as supposed by the plaintiffs.

* Gray v. Pingry, 17 Vermont, 419; Perkins v. Walker, 19 Id. 144; 1 Greenleaf on Evidence, 12 ed. 566; Shelley v. Wright, Willes, 9.

7. Identity of the parties, in the former suits, with the parties in the suit at bar, is beyond question, and it cannot be successfully denied that the cause of action, in the former suits, was the same as that in the pending action, within the meaning of that requirement, as defined by decided cases of the highest authority. Where the parties are the same, the legal effect of the former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title, and depends upon the same question.* Second suit for trespass was held, in the case of *Outram* v. *Morewood*,† to be barred by the record of a former judgment, between the same parties, recovered long before the second trespass was committed, as it appeared that the same title was involved in both cases. Precisely the same rule was also laid down in the case of *Burt* v. *Sternburgh*,‡ and the reason assigned in its support was, that the plaintiffs' right of recovery, and the defence set up in the second action, depended on the same title as that involved in the former suit. So, where an importer and two sureties executed two bonds for duties, and the principal being insolvent, one of the sureties paid the whole amount and brought a suit against the other surety for contribution on the bond which first fell due, and was defeated, on a plea of release, by the obligee, with his own consent, the judgment was held in a subsequent suit for contribution for the amount paid on the other bond, to be a conclusive bar to the second claim, it appearing that both bonds were given at the same time, upon the same consideration, and as parts of one and the same transaction.§

Different bonds, it will be noticed, were described in the two declarations, but the decision of the court was placed upon the ground, that the cases were precisely alike, as to the right of the plaintiff to demand, and the duty of the defendant, as a co-surety, to make contribution. Nothing is better settled, say the court, than that the judgment of a

* Doty v. Brown, 4 Comstock, 71. † 3 East, 346.
‡ 4 Cowen, 559. § Bouchaud v. Dias, 3 Denio, 248.

court of concurrent jurisdiction, directly upon the point made in the suit, is conclusive between the same parties, upon the same subject-matter, and they referred to the case of *Gardner* v. *Buckbee*,* as directly in point, and there can be no doubt that it is entirely analogous.

Substance of the material facts in that case was, that two notes had previously been given by the defendant for the purchase-money of a vessel, which he refused to pay; and in the suit on the first note the defence was, that it had been obtained by fraud, and the judgment was for the defendant; and in a subsequent suit on the other note, that judgment was held to be conclusive as to the question of fraud.

Weighed in the light of those decisions, it is quite clear that the cause of action, in the legal sense, is the same in the case at bar as that in the respective former judgments set up in the four replications under consideration.

In the suit determined in the State court, the declaration alleged to the effect that the defendants, under the authority conferred on the corporation by virtue of their charter, subscribed for fifty thousand dollars of the stock of the railroad company; that the company was chartered to construct, and was then constructing a railroad to said city; that a majority of the qualified voters of the city signified their assent to the subscription by expressing on their tickets, at an annual election in said city, that they were in favor of the same; that the defendants issued and sold the bonds to raise the funds to pay for the stock, and that the plaintiffs purchased the bonds and became the holders of the same and of the coupons thereto attached.

Defendants demurred to the declaration, but the court overruled the demurrer, and they subsequently filed an answer, setting up two defences: 1. That the location of the railroad was not established through the city till after the subscription. 2. That the company was not chartered to construct, and was not, at the date of the subscription, constructing a railroad to the city.

* 3 Cowen, 120.

Plaintiffs demurred to the first answer, and the demurrer was sustained by the court; and to the second defence they replied that the company located their railroad through the city before the bonds were delivered, and the defendants demurred to the replication, but the court overruled the demurrer.

Concluding statement of the record is, that "the said city, not desiring to controvert the facts stated in said reply, but admitting the same," judgment is rendered for the plaintiffs.

Second judgment set up in the replications, was rendered in the Circuit Court of the United States, in a suit on another set of the coupons attached to the same fifty bonds, and the declaration alleged that the defendants, by virtue of the power conferred in their charter, did lawfully and in due form execute and issue the bonds under the seal of the corporation, and that the plaintiffs, for a valuable consideration, became the legal holders and bearers of the same, and of the coupons thereto attached.

Special demurrer to the declaration was filed by the defendants, and they showed for cause, among other things, that it did not allege that the bonds were issued in pursuance of such a vote of the inhabitants of the city as the charter required. Both parties were heard, and the court overruled the demurrer and gave judgment against the defendants for the amount of the coupons, with interest. Inspection of those records, therefore, shows that the several questions involved in the present suit, as to the validity of the bonds, the time and place of the location of the railroad, and the alleged failure to secure the antecedent assent of a majority of the qualified voters of the city, were all put in issue in those cases. They were not only put in issue but they were determined, unless it be denied that the effect of a demurrer to the declaration or other pleading, is that it admits all such matters of fact as are sufficiently pleaded. Such a denial, if made, would be entitled to no weight, as it is a rule universally acknowledged.*

* 1 Williams's Saunders, 337, n. 3; Stephen on Pleading, 155; 1 Saunders on Pleading and Evidence, 952; 1 Chitty's Pleading, 662.

Foundation of the rule is that the party demurring, having had his option to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse.*

On the overruling of a demurrer, the general rule is that judgment for the plaintiff is final if the merits are involved, but a judgment that a declaration is bad, cannot be pleaded as a bar to a good declaration for the same cause of action, because such a judgment is in no just sense a judgment upon the merits.† Other exceptional cases might be named, but it is unnecessary, as none of them can have any bearing on this case.‡

Taken as a whole, the pleadings of the defendants in the respective cases amounted to a demurrer to the respective declarations, and the substantial import of the decision of the court in each case, was that the declaration was sufficient to entitle the plaintiffs to judgment. Beyond question they were judgments on the merits, although rendered on demurrer; and in such case the well-settled rule is that every material matter of fact sufficiently pleaded is admitted.

Since the resolution in *Ferrer's Case*,§ the general principle has always been conceded, that when one is barred in any action, real or personal, by judgment on demurrer, confession, or verdict, he is barred as to that or the like action of the like nature for the same thing forever.

Objection was taken in the case of *Bouchaud* v. *Dias*,‖ that the former judgment between the parties could not be a bar to the subsequent action, because it was rendered on demurrer to the defendant's plea, but the court held that it made no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and they also held that an admission, by way of demurrer to a pleading, in which the facts are alleged, must be just as available to

* Manchester Bank v. Buckner, 20 Howard, 303.

† Gilman v. Rives, 10 Peters, 298.

‡ Richardson v. Boston, 24 Howard, 188.

§ 6 Reports, 7. ‖ 3 Denio, 244.

the opposite party as though the admission had been made *ore tenus* before a jury.*

Reference to cases decided in other jurisdictions, however, is unnecessary, as this court decided, in the case of *Clearwater* v. *Meredith*,† that on demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue of fact joined upon the same pleading, and found in favor of the same party.‡

Defence of a former judgment rendered upon general demurrer to the declaration was also set up in the case of *Goodrich* v. *The City*,§ and this court held that it was a good answer to the suit, although the appellant insisted that it was not, because the judgment was rendered on demurrer.

8. Unsupported as the second proposition of the defendants is, as to the theory of fact on which it is based, it will not require any extended consideration. Much doubt and perhaps uncertainty exist in judicial decisions as to the limits, in certain cases, within which the conclusive effect of a judgment is confined by law as expressed in the maxim, *Nemo debet bis vexari pro una et eadum causa*, and also as to the manner in which the former judgment in that class of cases should be taken advantage of by the party.‖

But it is believed that the case at bar may be decided without encountering any of those conflicting opinions, as they occur chiefly where the party claiming the benefit of the former judgment failed to plead it at the first opportunity, or where no such opportunity was presented, and it was introduced under the general issue. Decisions made in such cases were cited at the argument, but they afford very little aid in the solution of any question arising in this record. Remark should also be made, that the several replications

* Perkins v. Moore, 16 Alabama, 17; Robinson v. Howard, 5 California, 428.

† 1 Wallace, 48.

‡ Christmas v. Russell, 5 Wallace, 303; Nowlan v. Geddes, 1 East, 634.

§ 5 Wallace, 578.

‖ Broom's Maxims (4th ed.), 321; Sparry's Case, 5 Reports, 61.

set up the former judgments, not merely as settling some collateral fact involved in the case, but as having determined the entire merits of the controversy involved in the pleadings.*

Such a case falls directly within the rule that the judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is, as a plea, a bar, and conclusive between the same parties upon the same matter directly in question in a subsequent action.†

When not pleaded, but introduced as evidence under the general issue, the judgment, it was said in that case, was equally conclusive between the parties; but that point will not be considered in this case, as it is in no manner involved in the pleadings. Express determination of the court, also, in the case of *Outram* v. *Morewood*,‡ was, that the rule that a recovery in one action is a bar to another, is not confined to personal actions alone, but that it extends to all actions, real as well as personal.

Repeated decisions established the rule, in the early history of the common law, that where a judgment was rendered on the merits it barred all other personal suits, except such as were of a higher nature, for the same cause of action.§

Judgment in a writ of entry is not a bar to a writ of right; but the meaning of the rule is, that each species of judgment is equally conclusive upon its own subject-matters by way of bar to future litigation for the thing thereby decided. Hence, the verdict of a jury, followed by a judgment or a decree in chancery, as held by this court, puts an end to all further controversy between the parties to such suit, and it has already appeared that a judgment for either party on demurrer to a pleading involving the merits, is the same as it would have been on an issue in fact, joined upon the same pleading, and found in favor of the same party.‖

* Stafford *v.* Clark, 2 Bingham, 377.

† Rex *v.* Duchess of Kingston, 20 State Trials, 538.

‡ 3 East, 357. § Hutchin *v.* Campbell, 2 W. Blackstone, 831.

‖ Hopkins *v.* Lee, 6 Wheaton, 113; Lawrence *v.* Hunt, 10 Wendell, 83; Wood *v.* Jackson, 8 Id. 9; Young *v.* Black, 7 Cranch, 565.

Opinion of the court.

Determination of this court, in the case of *Aspden* v. *Nixon*,* was that a judgment or decree, in order that it may be set up as a bar, must have been rendered by a court of competent jurisdiction upon the same subject-matter, between the same parties, and for the same purpose; and in the case of *Packet Co.* v. *Sickles*,† the decision was, that "the essential conditions under which the *exception of the res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants." Attempt was made in that case, as in this, to maintain that the judgment in the first suit could not be held to be an estoppel, unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise, and distinctly overruled that proposition, although the defence of estoppel failed for other reasons.

Courts of justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties.‡

Except in special cases, the plea of *res judicata*, says Taylor, applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.§

Substantially the same rule was laid down in the case of *Outram* v. *Morewood*,‖ in which the court said that "a recovery in one suit upon issue joined on matter of title, is

* 4 Howard, 467. † 24 Id. 341.

‡ Greathead v. Bromley, 7 Term, 455; Broom's Legal Maxims (4th ed.), 324.

§ 2 Taylor's Evidence, § 1513; Henderson v. Henderson, 3 Hare, 115.

‖ 3 East, 346.

equally conclusive upon the subject-matter of such title" in any subsequent action, as an estoppel.

Better opinion is, that the estoppel, where the judgment was rendered upon the merits, whether on demurrer, agreed statement, or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined in the course of the proceedings.*

The allegation in the case of *Ricardo* v. *Garcias*,† was, that the matters in issue on the second suit were the same, and not in any respect different from the matters in issue in the former suit, and the House of Lords held that the plea was sufficient—evidently deciding that nothing was open in the second suit which was within the scope of the issue in the former trial.‡ Properly construed, the opinion of this court on this point in the case of the *Packet Company* v. *Sickles*,§ is to the same effect, as plainly appears in that part of it in which the court say that if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter in question, it will be considered as having settled that matter as to all future actions between the parties. Applying that rule to the case at bar it is clear that a judgment rendered on demurrer settles every matter which was well alleged in the pleadings of the opposite party.

9. Separate examination of the authorities cited by the defendants, in view of their number, is impracticable, but it will appear, if they are carefully read and rightly applied, that they do not support the proposition under consideration. On the contrary, the decision of the court in the case of *Gilbert* v. *Thompson*,‖ is that a judgment in a former action is conclusive *where the same cause of action was adjudicated between the same parties*, or the same point was put in issue on the record and directly found by the verdict of a jury; and the case of *Merriam* v. *Whittemore et al.*,¶ is precisely to the

* 2 Smith's Leading Cases, 6th ed. 787.
† 12 Clark and Finelly, 400.
‡ Stevens v. Hughes, 7 Casey, 381.
§ 5 Wallace, 592.
‖ 9 Cushing, 348.
¶ 5 Gray, 316.

same effect. Unguarded expressions are found in the opinions in the case of *Carter* v. *James*,* but the decision turned upon the point that the cause of action was not the same in the pending suit as that litigated in the former action. For these reasons our conclusion is that the decision of the Circuit Court in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants was correct, and that the plaintiffs were thereupon entitled to judgment.

10. In such cases, where the sum for which judgment should be rendered is uncertain, the rule in the Federal courts is that the damages shall, if either of the parties request it, be assessed by a jury.†

But if the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the court, or what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain if neither party request the court to call a jury for that purpose. Common law rules were substantially the same, except that "the court themselves might, in a large class of cases, if they pleased, assess the damages, and thereupon give final judgment."‡

Evidently a jury in this case was not necessary, but it was not error to hear proofs under the submission, as both parties assented to the course pursued.

Exceptions were taken to the ruling of the court in allowing interest upon the coupons, and the bill of exceptions states that the exception of the defendants was allowed, but it does not state what amount of interest was included in the judgment, nor give the basis on which it was computed. Judging from the amount of the sum found due, it is, perhaps, a necessary inference that interest was allowed on each coupon from the time it fell due to the date of the judgment, and if so, the finding was correct.

* 13 Meeson & Welsby, 137.

† 1 Stat. at Large, 87, § 26; Renner et al. v. Marshall, 1 Wheaton, 218; Mayhew v. Thatcher, 6 Id. 129.

‡ 2 Saunders on Pleading and Evidence, 218; 2 Archbold's Practice, 709.

Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper.* Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached.† Interest, as a general rule, is due on a debt from the time that payment is unjustly refused, but a demand is not necessary on a bill or note payable on a given day.‡ Being written contracts for the payment of money, and negotiable because payable to bearer and passing from hand to hand, as other negotiable instruments, it is quite apparent on general principles that they should draw interest after payment of the principal is unjustly neglected or refused.§ Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time.‖ Governed by that rule this court in the case of *Gelpcke* v. *Dubuque*,¶ held that the plaintiff, in a case entirely analogous, was entitled to recover interest.**

Necessity for remark upon the other exceptions is superseded by what has already been said in respect to the plaintiff's demurrer.

JUDGMENT AFFIRMED, WITH COSTS.

Mr. Justice MILLER, dissenting.

The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation

* Mercer v. Hacket, 1 Wallace, 83; Meyer v. Muscatine, Ib. 384.

† Knox Company v. Aspinwall, 21 Howard, 544; White v. Railroad, 21 Howard, 575; McCoy v. County of Washington, 7 American Law Register, 193; Parsons on Bills and Notes, 115.

‡ Vose v. Philbrook, 3 Story, 336; Hollingsworth v. Detroit, 3 McLean, 472.

§ Delafield v. Illinois, 2 Hill, 177; Williams v. Sherman, 7 Wendell, 112.

‖ 2 Parsons on Bills and Notes, 393. ¶ 1 Wallace, 206.

** Thomson v. Lee County, 3 Wallace, 882.

than almost any other. But its effect is to prevent any further inquiry into the merits of the controversy. Hence, with all the salutary influence which it exerts in giving permanence to established rights, in putting an end to angry contests, and preserving tranquillity in society, it can only be justified on the ground that the precise point, either of law or of fact, which is presented in the suit where the estoppel is pleaded, had been previously decided between the same parties or their privies, by a court of competent jurisdiction. The principle is equally available and potent whether it is set up by a defendant as an answer to a cause of action, or by a plaintiff to prevent the same defence being used in the second suit that was decided against in the first. In the former case, it must appear that the cause of action in the second suit was the same that it was in the first suit, or depended on precisely the same facts. In the latter case it must appear that the defence set up in the second suit was the same defence, or in other words, consisted of the same facts or points of law as that which was passed upon in the first suit.

It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered concluded by that suit. But this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is, that when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. This is expressly ruled no less than three times within the last eight years by this court, to wit: in the *Steam Packet Co.* v. *Sickles*,* *Same* v. *Same*,† *Miles* v. *Caldwell*.‡ The principle asserted in these decisions is supported by an array of authority which I will not stop to insert here, but which may be found well digested and arranged in the notes of Hare and Wallace to the *Duchess of Kingston's Case*.§

The opinion just read asserts a different rule, and insists

* 24 Howard, 333. † 5 Wallace, 580. ‡ 2 Id. 35.

§ 2 Smith's Leading Cases, from page 791 to the end of the volume.

that whatever might have been fairly within the scope of the pleadings in the former suit, must be held as concluded by the judgment.

In the case before us, the second plea clearly and distinctly avers that the bonds, which are the foundation of plaintiffs' action, were issued without any good or valuable consideration, and that this fact was known to the plaintiffs when they received them. I have examined in vain all the pleas filed by defendants in the former suit to discover any plea which set up this defence, or which raised such an issue that the want of consideration *must* have been passed upon in deciding the case. Nor can I discover any plea under which it *might* have been decided. Here, then, is a distinct, substantial defence to the bonds sued on, sufficient to defeat the action, which was never presented to the court in the former action, and therefore, never decided; and I am of opinion that the former suit did not conclude defendants' right to have this matter inquired into in this action.

DURANT v. ESSEX COMPANY.

1. A decree dismissing a bill in an equity suit in the Circuit Court of the United States, which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties.
2. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.
3. Where the judges of the Supreme Court of the United States are equally divided in opinion upon the questions of law or fact involved in a case before the court on appeal or writ of error, the judgment of affirmance, which is the judgment rendered in such a case, is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

APPEAL from the Circuit Court for the District of Massachusetts.

The Constitution vests appellate jurisdiction in the Su-

preme Court under such regulations as Congress shall make, and Congress, by the act of March 3, 1803, authorizing appeals, provides that "the said Supreme Court shall be, and hereby is, authorized and required to receive, hear, and *determine* such appeals."

With these provisions in force, Durant filed a bill, in October, 1847, against the Essex Company, seeking to hold it liable for certain real estate. The bill was finally "dismissed." An appeal was taken to this court, where, after hearing the case, the judges were equally divided in opinion; and in conformity with the practice of the court in such cases it ordered that the decree of the court "be affirmed with costs."

The complainant, conceiving that as the judgment in this court was by a bench equally divided, there had been no decision of his case by the court of last resort, filed another bill—the bill in the court below—for the same relief in the same matter as he had filed the one before.

The defendant pleaded that the former suit and decree in this court—which the plea averred were made after testimony was taken on both sides, and the case heard on its merits and argued by counsel—were a bar to the present bill. This was determined by the court below to be so; and the mandate of this court being filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice. But the court refused leave, and dismissed the bill, no words being put in the decree that showed that the dismissal was other than an absolute one. Appeal here accordingly.

The questions which the appellant now sought to raise were:

1. Whether the decree of dismissal simply was a bar to a new suit?

2. What was the effect of an affirmance by an equally divided court?

Mr. Boyce, for the appellant, contended:

1. That the decree in the first suit being simply one of

dismissal, did not prevent the filing of a new bill in another court, or even in the same court.

2. That an affirmance by an equally divided court amounted to nothing; that this court, upon appeal, must "determine such appeal," and that a decree by a divided court was not a compliance with the act of Congress. It was an abdication of the appellate power, and, in effect, imparted the power to the Circuit Court.

Messrs. Merwin and Storrow, contra, considering the first point made plainly untenable, were proceeding to the second, when they were stopped by the court; Grier, J., referring them to a note of the late Horace Binney Wallace, Esq., of Philadelphia, appended to the case of *Krebs* v. *The Carlisle Bank*,* as to the effect of an affirmance of judgment by an equally divided court, which he said was "clear and satisfactory."

Mr. Justice FIELD delivered the opinion of the court.

The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.†

Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree

* 2 Wallace, Jr., 49. See it, *infra*, Appendix.

† Walden *v.* Bodley, 14 Peters, 156; Hughes *v.* United States, 4 Wallace, 237; Bigelow *v.* Winsor, 1 Gray, 301; Foote *v.* Gibbs, Ibid. 412.

that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal.*

In the case in the Circuit Court we are not left to conjectures, or to presumptions, as to what was intended by the decree. The plea of the defendants avers, that testimony was taken on both sides, and that the case was heard on its merits, and argued by counsel. And when the mandate of this court was filed, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice; but the motion was denied and the decree was affirmed.

There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means.

Thus, in *Iveson* v. *Moore*,† a verdict was rendered for the

* Lindsay *v.* Lynch, 2 Schoales & Lefroy, 10; Woollam *v.* Hearn, 7 Vesey, 222; Stevens *v.* Guppy, 3 Russell, 185; Sewall *v.* Eastern R. R. Co., 9 Cushing, 13; Miles *v.* Caldwell, 2 Wallace, 45; Carneal *v.* Banks, 10 Wheaton, 192; Dandridge *v.* Washington, 2 Peters, 878; Piersoll *v.* Elliott, 6 Id. 100; Gaylords *v.* Kelshaw, 1 Wallace, 88; Barney *v.* Baltimore, 6 Id. 289; Hobson *v.* McArthur, 16 Peters, 195.

† 1 Salkeld, 15; S. C., 1 Lord Raymond, 495.

plaintiff, and according to the practice prevailing in the English courts, a rule was entered for judgment *nisi*. Afterwards a rule was obtained that the judgment should be arrested *nisi*—that is, unless cause be shown against the arrest. On motion to discharge this latter rule the judges were equally divided, and no order could be made. But the court said, if "it had been divided on the first motion [that is, the motion against the judgment under the general rule], the plaintiff might have entered judgment; but now this rule [in arrest] must stand or be discharged, and discharged it cannot be, for the court is equally divided." The inability of the court, from the division, to take affirmative action, would have allowed the plaintiff to enter his judgment under the general rule if no order in arrest has been made; but that being made, the position of the parties was changed.

In *Chapman* v. *Lamphire*,* the plaintiff obtained a verdict, upon which the usual rule was entered for judgment *nisi*, in accordance with the established practice. A motion was then made for the arrest of the judgment, and it is reported that "the judges were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon a demurrer or special verdict, then it would have been adjourned to the Exchequer Chamber."

By a law of England, passed as long ago as 14 Edward III, if the judges of the King's Bench, or Common Pleas, are equally divided, the case is to be adjourned to the Exchequer Chamber, and be there argued before all the justices of England. If these are equally divided, it is to be determined at the next Parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor, and treasurer, the judges, and other of the king's council.†

In the case of the special verdict, affirmative action would be required to enter judgment, which would be impossible

* 8 Modern, 155.

† Comyn's Digest, title Court, D. 5; Coke Litt. 71, 2.

from the division of the judges. But in the case of the demurrer, the effect of a division would depend, we think, upon the rules of practice established in such cases, for in the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it, as was the fact in this court in the case between the commonwealth of Virginia and West Virginia, argued upon demurrer to the bill at the last term.

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

The Antelope,* and *Elting* v. *The Bank of the United States*,† are cases where the decisions of the court below, or some part of them, were affirmed upon a division of the judges, and a term seldom passes in which there are not several cases disposed of in this way. In *Brown* v. *Aspden*,‡ Chief Justice Taney observed that there was no difference between a decree in chancery and a judgment at law as to its affirmance on a division of the court. "In both cases," he said, "the motion is to reverse, and if that fails, the judgment, or decree, necessarily stands."

It is also the practice of the Exchequer Chamber in England to affirm the judgment of the court below, brought before it on a writ of error, when the judges are equally divided. Where a case is adjourned to that court, under the

* 10 Wheaton, 66. † 11 Id. 59. ‡ 14 Howard, 28.

statute of 14 Edward III, upon a division of the judges of the court below, the practice, as we have stated, is different. But on writs of error it is similar to that followed by this court. Such, also, is the practice of the House of Lords when sitting as a court of appeals. It is said that this practice depends upon the manner in which the Lords put the question, which is always in this form: Shall this judgment, or decree, be reversed? But that is the question in all appellate courts, and the particular manner in which the question is stated, cannot change the rule of law on the subject.*

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

JUDGMENT AFFIRMED.

KENDALL v. UNITED STATES.

A claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, cannot be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them.

APPEAL from the Court of Claims.

A. and J. Kendall made an agreement, in the year 1843, with persons representing a branch of the Cherokee tribe of Indians, called the Western Cherokees, to prosecute a claim

* See Bridge v. Johnson, 5 Wendell, 372.

which these Indians set up against the United States. It was a part of the agreement that the Kendalls were to receive, directly from the United States, 5 per cent. upon all sums that might be collected on the claim.

The justice of this claim, which it was thus agreed that the Kendalls should prosecute, had never been acknowledged by the United States, and the amount of it was uncertain. A treaty was finally made, in 1846, not with the Western Cherokees, who were but a part of the Cherokee tribe, but with the whole tribe; and it embraced not only the claim set up by the Western Cherokees, but many other matters, settling matters between the United States and the tribe, as also between the Western Cherokees and the main body. The treaty, as finally ratified by the Senate and by the tribe, provided that the sum of money found due (and which included moneys to the main tribe), should be held in trust by the United States, and paid out to each individual Indian, or head of a family, and that this *per capita* allowance should not be assignable, but should be paid directly to the person so entitled. On the 30th September, 1850, Congress made an appropriation of the amount necessary to fulfil this treaty, and the act contained a provision that *no part of the money should be paid to any agents of said Indians, or to any other person than the Indian to whom it was due.*

The Kendalls having thus failed to get anything from the appropriations, presented a petition to the Court of Claims. They set forth in it the fact and history of the treaty, the great labor which they had had, and the value of which their services had been in procuring the treaty and appropriation (with interest, about $887,000); all, as they alleged, due to those services. That they had repeatedly given specific notice to Congress and to its committees, and to all proper officers of the government, of the contract made by them with the Indians, and of their claim under it, and of the justice of the same.

There was no answer or evidence produced on the other side.

The Court of Claims dismissed the petition.

Arguments for the appellants and appellee.

Messrs. Carlisle and McPherson, for the appellants:

1. The contract and order given by the Indians operated as a valid assignment of one-twentieth part of the amount due the Indians;* it being settled that, in equity, an order given by a debtor to his creditor, upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund;† and these rights of assignees being recognized and protected in courts of law.‡

2. Neither the treaty of 1846, nor the act of 1850, prohibited the payment of this claim. It is true that there are in the treaty provisions intended to secure to the Indian himself the amount due to him; but, while the treaty prohibits payment to any agent of an Indian, and prohibits, prospectively, any assignment of the share of any Indian, it is silent as to any existing assignment, and uses no words applicable to an assignment made by the body of the tribe out of the gross sum. The act of 1850 is more comprehensive in its language, but it was made simply to carry into effect the treaty, and its terms are to be construed in connection with the treaty itself.

Mr. Dickey, Assistant Attorney-General, contra:

1. The pretended assignment, by the Indians, of a portion of their claim, could not, if valid, be enforced in a court of law.§

The Court of Claims has no equity jurisdiction.‖

2. The assignment was not valid unless recognized to be so by the United States.¶

* Smith & Everett, 4 Brown's Ch. 64; Lett & Morris, 4 Simons, 607; Morton v. Naylor, 1 Hill (N. Y.), 583; Watson v. Duke of Wellington, 1 Russell & Mylne, 605.

† Burn v. Carvalho, 4 Mylne & Craig, 699.

‡ Littlefield v. Storey, 8 Johnson, 426; Prescott v. Hull, 17 Id. 284; Wheeler v. Wheeler, 9 Cowen, 34.

§ Mandeville v. Welch, 5 Wheaton, 286; Tiernan et al. v. Jackson, 5 Peters, 597.

‖ United States v. Alire, 6 Wallace, 575.

¶ The Cherokee Nation v. The State of Georgia, 5 Peters, 16.

3. The treaty of 1846, and the act of 1850, prohibited the payment of this claim.

The justice or injustice of this action of the government, is not a matter for the consideration of the Court of Claims. The case of the appellants stands upon the legal effect of their agreement with the Indians, and there is nothing in it which can override the action of the treaty-making and the law-making powers of the government.

Mr. Justice MILLER delivered the opinion of the court.

As the case was decided on demurrer, or what is equivalent to a demurrer, the statements of the petition must be taken to be true. They show a faithful and laborious performance of their contract by the plaintiffs, for which no compensation was ever received.

It is insisted by plaintiffs, that because the government of the United States was aware of the contract between them and the Indians, and failed to reserve and pay over to them the five per cent. which by that contract they had a right to claim of the Indians, the United States is liable to them for the amount. It is supposed that the doctrine of an equitable assignment of a debt or fund due from one person to another, by the order of the creditor to pay it to a third party, when brought to the notice of the debtor, is a sufficient foundation for the claim. But, if we concede that the government is to be treated in the present case precisely as a private individual, it is not easy to see how that doctrine can be made to apply. The debt or fund as to which such an equitable assignment can be made, must be some recognized or definite fund or debt, in the hands of a person who admits the obligation to pay the assignor; or, at least, it must be some liquidated demand, capable of being enforced in a court of justice. We apprehend that the doctrine has never been held, that a claim of no fixed amount, nor time, or mode of payment; a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignor an equitable right to prevent the original parties

from compromising or adjusting the claim on any terms that may suit them. That is just what is claimed in this case. For it is very clear that if this equitable claim in the hands of plaintiffs was not effectual before the treaty, it can have no effect afterwards.

The treaty, by its terms, is incompatible with the claim of plaintiffs. None of the money could be paid to the plaintiffs if all of it was to be paid to the Indians individually, in proportions to be determined by their numbers.

This principle of paying to the Indians *per capita* was not adopted with any reference to the plaintiffs' claim as a means of exclusion. The treaty was made with the entire tribe of Cherokees, of which these Western Cherokees were but a small part; and the claims which they were urging on our government constitute a still smaller part of the matters settled by the treaty.

Land claims were adjusted, the difficulties between this branch and the main body of the tribe were arranged. Other payments were made to the main tribe, in which the rule of paying *per capita* was adopted. Now, the argument assumes that unless in adjusting all these important interests the United States kept in view the sum to be paid to plaintiffs, by their contract with the Indians, and provided for it, they must either make no treaty at all, or must pay their claim. It cannot be permitted that by contracting with other parties, without requiring or asking the consent of the government, any one can establish such a right to control the action of that government in making treaties or contracts.

The claim of the Western Indians was nothing more than a claim prior to the treaty. Its justice had never been admitted. Its amount was uncertain. These, together with the mode of payment, were all unsettled, and open to negotiation. Is it possible, that by making a contract with claimants to prosecute this demand against the government, the plaintiffs thereby acquired such a hold on that government, as not only made the claim good to that extent, but prevented it from compromising or settling with the claimants on the best terms to be obtained?

We have no hesitation in saying that the United States, under the circumstances, had the right to make the treaty that was made, without consulting plaintiffs, or incurring any liability to them. The act of Congress which appropriated the money, only followed the treaty in securing its payment to the individual Indians, without deduction for agents. And both the act and the treaty are inconsistent with the payment of any part of the sum thus appropriated to plaintiffs.

The judgment of the Court of Claims, rejecting the demand, is therefore AFFIRMED.

COWLES v. MERCER COUNTY.

1. A municipal corporation created by one State within its own limits may be sued in the courts of the United States by the citizens of another State.
2. The statutes of a State limiting the jurisdiction of suits against counties to Circuit Courts held within such counties can have no application to courts of the National government.

ERROR to the Circuit Court for the Northern District of Illinois, the case being thus:

A statute of Illinois enacts by one section that, "Each county established in the State shall be a body politic and corporate, by the name and style of 'The County of ——;' and by that name may sue and be sued, plead and be impleaded, defend and be defended against, in any court of record, either in law or equity, or other place where justice shall be administered;" and by another, that "All actions, local or transitory, against any county, may be commenced and prosecuted to final judgment and execution *in the Circuit Court of the county against which the action is brought.*"*

And the Supreme Court of Illinois has decided that a county can neither sue or be sued at common law, independent of legislative provisions, and have construed the

* Revised Laws, 1845, §§ 1, 18.

foregoing sections of the statute to exclude the right to sue any county elsewhere than in the Circuit Court of the county sued.*

In this condition of the State law, Cowles, a citizen of New York, brought suit in the *Circuit Court of the United States* for the Northern District of Illinois, against the supervisors of Mercer County, Illinois (a board authorized to contract for the county), upon certain bonds issued by them on behalf of the county. The defendant, relying on the statute and the interpretation of it by the highest court of the State, moved to dismiss the case for want of jurisdiction. The motion was overruled, and various other defences, already frequently settled in this court as untenable, having been also disallowed, judgment was given for the plaintiff below. The case was now brought here on error by the county.

Mr. Goudy, for the County, plaintiff in error:

So far as the laws of the State of Illinois can control this question, Cowles could not sue in the Federal court. Is there any provision of the Federal Constitution or laws superior to the State rule?

By the Constitution, the judicial power extends to controversies between *citizens* of different States. The right to bring a suit against a corporation has been sustained only upon the theory that the different natural persons who were members of the corporate body were in fact or conclusively presumed to be citizens of the State creating the corporation. And all the cases in which the question of jurisdiction was decided by this court were in regard to private corporations, where there was no limitation to the right to sue and be sued. The question as to whether a municipal or *quasi* corporation can be sued in a Federal court has never been decided by this court.

Admit that where a number of the citizens of a State are incorporated, and no limitations of the liability to sue are

* Schuyler Co. v. Mercer Co., 4 Gilman, 20; Rock Island Co. v. Steele, 31 Illinois, 544; Randolph Co. v. Ralls, 18 Id. 30.

made in the charter, the intent is presumable to impress upon the artificial body the same liability that the natural members were under, yet the State has never parted with its power to create and establish a corporate body with such powers and liabilities as it chooses to give. A corporation is the creature of the law-making power, and has such elements, attributes, powers, rights, and liabilities, as the legislature chooses to give. It may be made with the characteristics of a natural person, or it may be made with the least conceivable elements of such a character. Its distinguishing element is perpetuity, but it may consist of one or many natural persons; it may have no right to hold real or personal property; it may be destitute of the right to contract, or to sue or be sued. Is it not competent for the legislative authority to say that a corporation may be created with power to contract which can only be enforced in a court of general jurisdiction holden where it exercises its power? Such a provision is in the nature of a privilege, like that in England where certain classes can only be sued in specified counties, and similar instances in this country. Does the mere creation of a corporation necessarily carry with it the right to make an agreement, and does that subject it to a liability to suit in all courts beyond the power of the legislature to restrain?

It is true that the members of a corporation would be liable to be sued on a cause of action against them as natural persons accrued to the citizen of another State in a Federal court. But a contract of a corporation with limited powers is not the obligation of the individual members; it is the agreement of the artificial person alone.

These observations apply with great force to municipal corporations. For the purpose of better carrying on the local government, the people of the county are made a corporate body, but not with irrevocable powers or vested rights. It is at all times subject to such changes or repeal as the legislative power chooses to make.

It was thought wise to adopt the 11th Amendment to the Constitution of the United States prohibiting all suits *against*

a State; the same idea doubtless influenced the legislature of Illinois in providing that a body of the people of the State organized solely for local government should only be sued in the principal court of their own county. This doctrine does not impose any hardship on any person. The same statute which made a county a corporation, declared that it could only be sued in the Circuit Court within its own limits.

The CHIEF JUSTICE delivered the opinion of the court.

The record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois. It presents but little difficulty.

The board of supervisors is a corporation created by acts of the legislature of Illinois.

It has never been doubted that a corporation, all the members of which reside in the State creating it, is liable to suit upon its contracts by the citizens of other States; but it was for many years much controverted whether an allegation in a declaration that a corporation defendant was incorporated by a State other than that of the plaintiff, and established within its limits, was a sufficient averment of jurisdiction. And in all the cases, prior to 1844, it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough re-examination in the case of *The Louisville, Cincinnati, and Charleston Railroad Company* v. *Letson;** and it was held that a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen within the meaning of the Constitution giving jurisdiction founded upon citizenship. This decision has been since reaffirmed, and must now be taken as the settled construction of the Constitution.

In the case before us the corporators are all citizens of

* 2 Howard, 497.

Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution.

But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the Circuit Courts of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in National courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution. We cannot doubt the constitutional right of the defendant in error to bring suit in the Circuit Court of the United States upon the obligations of the County of Mercer against the plaintiff in error. And we find no error in the judgment of that court. It must, therefore, be

AFFIRMED.

NICHOLS v. UNITED STATES.

1. Under the act of Congress of February 26, 1845, relative to the recovery of duties paid under protest, a written protest, signed by the party, with a statement of the definite grounds of objection to the duties demanded and paid, is a condition precedent to a right to sue in any court for their recovery.
2. Cases arising under the Revenue Laws, are not within the jurisdiction of the Court of Claims.

APPEAL from the Court of Claims.

An act of Congress of February 26, 1845,* construing a former act relative to duties paid under protest, says:

"Nor shall any action be maintained against any *collector*, to

* 5 Stat. at Large, 727.

recover the amount of duties so paid under protest, unless the said protest was made *in writing and signed by the claimant*, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

In this state of the statute law, Nichols & Co., merchants of New York, imported from abroad to that city, in 1847–51, certain casks of liquor. Duties were imposed at the custom-house, at New York, on the quantity invoiced; that is to say, on the amounts which the casks contained when they were shipped. A portion of the liquors, however, leaked out during the voyage, and being thus lost, was never imported at all, in fact, into the United States. Notwithstanding this circumstance, Nichols & Co. paid the duties, as imposed; that is to say, duties on the amount as invoiced, *making no protest in the matter.* They now, July, 1855, by petition, setting forth their case, including the fact that they had "omitted to protest," brought suit against the United States for the over-payment, in the Court of Claims; a court which, by the acts of Congress establishing it, has power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."

The petition asserted the law, as settled by this court in *Lawrence* v. *Caswell*,* to be, that duty was chargeable only on the value of the liquors imported into the United States, and that the quantity lost by leakage, on the voyage of importation, was not subject to any duty. A view in conformity, as they alleged, with a Treasury circular of January 30, 1847, directing that, "if the quantity of any article falls short of the amount given in the invoice, . . . an abatement of the duties to the extent of the deficiency will be made."†

As a reason for not presenting the claim to the Treasury Department, the petitioners stated that they omitted to protest.

The United States demurred to the petition, and the de-

* 13 Howard, 488.

† 1 Mayo, 891.

murrer being sustained, the petition was dismissed. The importers now appealed.

Mr. William Allen Butler, for the appellants, contended, that the case was within the *jurisdiction* of the Court of Claims, for the claim was founded upon—

1st. A law of the United States, to wit, the Tariff Act, in operation at the time of the importations; an act which had regulated the assessment of duties on the liquors; upon—

2d. A regulation of an executive department, to wit, the Treasury; which sort of regulation the circular of January 30, 1847, was; a regulation as to deficiencies; and upon—

3d. An implied contract of the United States, springing from the obligation of the government to refund, irrespective of protests, the duties, if illegally exacted.

Viewed in the light in which the claim was placed by the act creating the Court of Claims, and by the decision in *Lawrence* v. *Caswell*, it was to be judged according to the rules of law applicable to cases where a party sues to recover money paid to another, in order to obtain possession of his goods from the latter, who has withheld them upon an illegal demand, *colore officii*. In such cases the law forces upon the wrongdoer the promise, *in invitum*, to pay the money to the party entitled to it. The Court of Claims has decided that this class of cases come within the provisions of the acts conferring jurisdiction upon the court.*

Neither was a written protest, made at the time before the collector, a pre-requisite to maintain suit *here*. There was no law requiring importers, overcharged by collectors of customs, to pursue the remedy authorized by the act of February 26, 1845, viz.: payment of the duties under protest, and suit against the collector. They might, if they so elected, apply to Congress, by petition, for an act directing the return of the duties. So they might come into this court and ask *its* relief. It was only where the importer

* Schlesinger's Case, 1 Nott & Huntingdon, 16, 17.

exercised his right of action against the collector, that the absence of protest in writing could affect the question of the legality of the exaction. If the exaction was wrongful, and an obligation existed on the part of the government, the principal receiving money, to repay it, that obligation, when sought to be enforced directly against the government, could not be impaired by a condition made by it, for mere security perhaps, respecting the mode of enforcing a liability for the same obligation against its *agents*.

Mr. Evarts, Attorney-General, and Mr. Talbot, contra:

This appeal assumes as true that, at common law, the appellant has, against the United States, a right of action to recover the moneys claimed in his petition, which right was made available by the statutes establishing the Court of Claims, under no limitations save those prescribed for proceedings in that court. The assumption is false. The common law implies no contract on the part of the government to repay money erroneously collected into the public treasury for public dues. This point sustained, the appeal fails. But further:

1. No new liability on the part of the government, in this respect, has been created by the statutes establishing or relating to the Court of Claims. This appears by the statutes themselves.

2. What the revenue statutes define to be a compulsory payment in a case like this, and that alone, is such. Everything else is voluntary.

3. At common law the payment alleged by the petition is not compulsory.*

Mr. Justice DAVIS delivered the opinion of the court.

Two questions arise in this case:

1st. Was there any liability on the part of the government to refund these duties prior to the act establishing the Court of Claims?

* Bend *v.* Hoyt, 13 Peters, 263.

2d. If not, has that act fixed any new liability on the government?

The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.

It is not important for the purposes of this suit, to notice any of the acts of Congress on the subject of the payment of duties on imports, anterior to the act of February 26, 1845.* This act altered the rule previously in force, and required the party of whom duties were claimed, and who denied the right to claim them, to protest in writing, with a specific statement of the grounds of objection.

Through this law Congress said to the importing merchant, you must pay the duties assessed against you; but, as you say, they are illegally assessed, if you file a written protest stating wherein the illegality consists, you can test the question of your liability to pay, in a suit against the collector, to be tried in due course of law, and, if the courts decide in your favor, the treasury will repay you; but in no other way will the government be responsible to refund.

The written protest, signed by the party, with the definite grounds of objection, were conditions precedent to the right to sue, and if omitted, all right of action was gone. These conditions were necessary for the protection of the government, as they informed the officers charged with the collection of the revenue from imports, of the merchant's reasons for claiming exemption, and enabled the Treasury Depart-

* 5 Statutes at Large, 727.

ment to judge of their soundness, and to decide on the risk of taking the duties in the face of the objections. There was no hardship in the case, because the law was notice equally to the collector and importer, and was a rule to guide their conduct, in case differences should arise in relation to the laws for the imposition of duties. The allowing a suit at all, was an act of beneficence on the part of the government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same. After the passage of the law of 1845, the duties in controversy were paid.

The appellants say they were illegally exacted, because it was decided by this court, in *Lawrence* v. *Caswell*,* that the duties ought to be charged only upon the quantity of liquors actually imported, and not on the contents stated in the invoices; but the Chief Justice took occasion to observe in deciding that case, "that where no protest was made the duties are not illegally exacted in the legal sense of the term. If the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal (the Secretary of the Treasury) to which the law had confided the power of deciding the question." In view of this decision and the plain requirements of the law, how can Nicholl & Co. complain? They knew by proceeding in a certain way they could resort to the legal tribunals, and yet for a series of years they imported liquors, and paid the duties demanded without objection. They had an equal right, with the Secretary of the Treasury, to construe the law under which the duties were claimed, and as they chose not to appeal to the courts, they adopted the construction which the secretary put on the law, and are concluded by his decision. If a party who did not adopt that construction placed himself in a way to contest it, and got a decision that it was

* 18 Howard, 488.

erroneous, such decision cannot enure to the benefit of Nicholl & Co., who by their conduct notified the government, so far as they were concerned, they acquiesced in the secretary's construction of the law. It may be their misfortune that they did not appeal from the secretary's decision; but it is a misfortune that occurs to any party, in a lawsuit, who refuses to appeal from the decision of an inferior court, and afterwards finds, by means of another's litigation, that if he had appealed the decision would have been reversed.

If the duties demanded of Nicholl & Co. had been paid under protest, their payment, in the sense of the law, would have been compulsory, but as they were paid without protest it was a voluntary payment, doubtless made and received in mutual mistake of the law; but in such a case, as was decided in *Elliott* v. *Swartwout*,* no action will lie to recover back the money. And so this court has repeatedly held.†

It is clear, therefore, that the appellants are without remedy, unless a new liability has been imposed on the government by the act creating the Court of Claims.

Does this act confer on the appellants any further or different rights than they had prior to its passage? If not, there is an end to this suit.

The Court of Claims has power to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.

Conceding, that this jurisdiction draws to it cases arising under the revenue laws, then it is contended, as this suit is founded on one of the tariff acts of Congress, which has been judicially interpreted so as to sustain the claim, therefore the case of the appellants is brought within the first jurisdictional clause of the act creating the Court of Claims. But this result does not follow, for if the court has decided that the appellants, if they had protested, would have been entitled

* 10 Peters, 153.

† Bend v. Hoyt, 13 Peters, 268; Lawrence v. Caswell, 13 Howard, 488; Curtis v. Fiedler, 2 Black, 461.

to be reimbursed for the excess of duties paid by them, it has also decided, by not protesting they lost all right to ask for repayment; and there has been no law of Congress passed since this decision placing them in the position they would have been if they had protested. Neither can they invoke to their aid a regulation of the Treasury Department, which alone of all the departments deals with the question of duties on imports, for there is no regulation touching the subject, as is very evident from the averment in their petition, that the Treasury Department would not pay them because they omitted to protest.

Besides, if there had been a regulation of the department on the subject, it could not affect the rights of the appellants, for such a regulation cannot change a law of Congress.

It is insisted, however, if this suit cannot be sustained on these grounds, it can be sustained on an implied contract springing from the obligation of the government to refund all duties that are illegally exacted. But we have seen that these duties were not illegally exacted, were paid voluntarily, and there is no such thing as an implied promise to pay against the positive command of a statute.*

Enough has been said to show that if the Court of Claims could take jurisdiction of this class of cases, its judgment was right on the merits of this particular case.

But after all, the important subject of inquiry is, did Congress, in creating the Court of Claims, intend to confer on it the power to hear and determine cases arising under the revenue laws?

The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with despatch, and that the officers of the treasury should be able to make a reliable estimate of means, in order to meet liabilities. It would be difficult to do this, if the receipts

* Cary v. Curtis, 3 Howard, 236.

from duties and internal taxes paid into the treasury, were liable to be taken out of it, on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be, that the treasury estimates for any current year would be unreliable. To guard against such consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a *system*, which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.

And an equal provision has been made to correct errors in the administration of the internal revenue laws. The party aggrieved can test the question of the illegality of an assessment, or collection of taxes, by suit; but he cannot do this until he has taken an appeal to the Commissioner of Internal Revenue. If the commissioner delays his decision beyond the period of six months from the time the appeal is taken, then suit may be brought at any time within twelve months from the date of the appeal.* Thus it will be seen that the person who believes he has suffered wrong at the hands of the assessor or collector, can appeal to the courts; but he cannot do this until he has taken an intermediate appeal to

* 14 Stat. at Large, 111, amendment to § 44; § 19, on p. 152.

the commissioner, and at all events, he is barred from bringing a suit, unless he does it within a year from the time the commissioner is notified of his appeal. The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.

These provisions are analogous to those made for the benefit of the importing merchant, and the same results necessarily follow. If the importer does not protest, his right of action is gone. So, if the party complaining of an illegal assessment does not appeal to the commissioner, he is also barred of the right to sue, and he is without remedy, even if he does appeal, unless he sues within twelve months. Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the taxpayer and importer a further and different remedy?

The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws.

Without pursuing the subject further, we are satisfied that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims.

JUDGMENT AFFIRMED.

LINCOLN v. CLAFLIN.

1. A bill of exceptions should only present the rulings of the court upon some matter of law, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issue involved.
2. In an action against two defendants for fraudulently obtaining the property of the plaintiff, the declaration alleged that the fraud was a matter of pre-arrangement between them. The fraud of one of the defendants was not contested; and as to the other defendant, *Held*, that his subsequent participation in the fraud and its fruits was as effective to charge him as preconcert and combination for its execution.
3. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible.
4. Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence.
5. Interest is not allowable as a matter of law, in cases of tort. Its allowance as damages rests in the discretion of the jury.
6. Where a charge to the jury embraces several distinct propositions, a general exception to it will not avail the party if any one of the propositions is correct.

ERROR to the Circuit Court of the Northern District of Illinois.

Claflin and others brought an action on the case against two defendants, Lincoln and Mileham, for fraudulently obtaining the property of the plaintiffs, alleging a combination and *prearrangement* between them, by which Mileham purchased goods to a large amount of different parties in New York, and among others of the plaintiffs, upon false and fraudulent representations of his means and business, and Lincoln sold them at St. Louis, within a few days afterwards, at auction, for less than their cost price, and appropriated the proceeds to his own use; the whole thing being alleged to have been done with intent to defraud the vendors of their property.

That *Mileham* was guilty of the fraud was not seriously controverted in the court below.

The principal defence turned upon the connection of the

defendant Lincoln with the fraudulent acts of Mileham. Lincoln had been, it was alleged, a large creditor of Mileham, and, as he and Mileham asserted, had obtained the goods from Mileham only by his own superior vigilance, and to pay his own just debt. On the subject of the fraudulent connection of the parties, the court charged that the jury must be satisfied either that Lincoln was a party to the original fraud, or that he became a party to it by his own conduct and acts subsequently, with knowledge of the fraud; and that this last, if true, "*would be the same as though he had been a party to it originally.*" The court also admitted evidence of other similar fraudulent transactions of the same parties, with others, made about the same time. The court also allowed declarations of each party, made in the absence of the other, relating to the transaction in question, to go to the jury; but it charged that whether these declarations would be evidence as against both, would depend on the view the jury should take in relation to the completion and consummation of the fraudulent enterprise; that is to say, if they believed there was a fraudulent concert between the two defendants, and that these declarations were made during the progress and continuation of the enterprise, what each said would be evidence against the other; but that if the enterprise was ended and completed before the declarations were made, then that what one said would not be evidence against the other. As to damages, it charged that if the jury should find for the plaintiffs, that the amount should be "the value of the goods at the time they were purchased, *with interest* from that time."

The plaintiff excepted to the admission of the evidence above mentioned, and to the charge of the court *generally*, but did not except to it on the ground of a wrong instruction as to interest. The bill of exceptions set out the whole evidence given on the trial, with a long charge *in extenso*, and occupied ninety-six pages out of a hundred and twenty-six which composed the record.

The plaintiff recovered judgment, and the defendant, Lincoln, brought the case by a writ of error to this court.

Argument for the plaintiff in error.

Mr. Goudy, for the plaintiff in error:

1. *The allegata and probata do not agree.* The *gist* of the declaration was the purchase of the plaintiff's goods in pursuance of a fraudulent *prearrangement* between Mileham and Lincoln. Under the allegations the purchase was made as much by Lincoln as Mileham; and Lincoln was an original party to the fraud; not an accessory after the fact, but a principal. Of these allegations there was no proof. There was, therefore, a variance.

The court might have properly charged that the acts of Lincoln subsequent to the purchase were sufficient evidence that he was an original conspirator. But it charged instead that it was unimportant whether he entered into a conspiracy and was a party by preconcert or not; that it was sufficient to convict him, if, knowing of the fraud by Mileham, he became a party to it subsequently. There was no *such* cause of action set forth, and no such issue.

If such cause of action had been set forth it would not have been a good one. A conspiracy subsequently to the purchase of goods, although fraudulent and injurious, is no cause of action. *Adler* v. *Fenton** decides this. Indeed, in that case, there was a conspiracy and fraud for the express purpose of defeating the creditor. Here there was a mere effort of one creditor to gain priority over another; an act which the law commends; for it helps the vigilant, not the sleeping.

2. *The admissions were wrongly received.* It is true that the court below charged that they would not be evidence as against both of the defendants unless the conspiracy was proved and the common purpose had not been accomplished and completed. But this did not cure the error. There was no evidence of conspiracy, and the reception of the evidence caused a prejudice in the jury against the defendant.

3. That interest is not allowed *eo nomine* in an action to recover damages for the wrongful conversion or tortious

* 24 Howard, 408.

taking of property, but is a matter of discretion with the jury, is settled.*

Mr. Farnsworth, contra:

1. Opposing counsel argue the case as if it were in the court below. They contend that Lincoln was a creditor of Mileham, but that question was passed on by the jury, who have obviously found in the negative.

The charge as to Lincoln's connection with the fraud was right. The doctrine laid down in it is held even in criminal cases. Thus, in *The People* v. *Mather*,† the court say:

"Whenever a new party concurs in the plans originally formed, and comes in to aid in the execution of them, he is from that moment a fellow-conspirator. He commits the offence whenever he agrees to become a party to the transaction, or does any act in furtherance of the original design."

Adler v. *Fenton*, relied on to show no cause of action, was an action brought by creditors of Adler & Schiff, upon the complaint that they had fraudulently conspired with their co-defendants to dispose of their property, so as to defeat creditors: the decision was based on the ground that courts would not prevent an insolvent debtor from alienating his property, and that as Adler & Schiff were the legal owners of the property at the time the suit was commenced, no one had any right to interfere with their use. Our case is different. We do not allege that we have suffered damage, by reason of a conspiracy between Lincoln and Mileham, fraudulently to dispose of the property of the latter, *but seek to recover damages against them for obtaining, by a fraudulent conspiracy, the possession of our property.* The theory of our case is, that no title for the goods he got from us ever passed to Mileham; but that through a prearrangement and conspiracy with Lincoln, they two fraudulently obtained possession of our property, which resulted in damage to us to its value.

* Gilpins v. Consequa, Peters's Circuit Court, 95; Willings v. Same, Ib. 174; Beals v. Guernsey, 8 Johnson, 458.

† 4 Wendell, 261.

2. The admissions were rightly received,* even if in an action like the present one a recovery might not be had against any *one* of the defendants against whom a case was made; which it may be.†

Mr. Justice FIELD delivered the opinion of the court.

The bill of exceptions in this case is made up without any regard to the rules in accordance with which such bills should be framed. It is little else than a transcript of the evidence, oral and documentary, given at the trial, and covers ninety-six printed pages of the record, when the exceptions could have been presented with greater clearness and precision in any five of them. In its preparation counsel seem to have forgotten that this court does not pass, in actions at law, upon the credibility or sufficiency of testimony; that these are matters which are left to the jury, and for any errors in its action the remedy must be sought in the court below by a motion for a new trial. A bill of exceptions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some

* Whittier v. Varney, 10 New Hampshire, 294; Bridge v. Eggleston, 14 Massachusetts, 250; Foster v. Hall, 12 Pickering, 89; Howe v. Reed, 8 Fairfield, 515; Blake v. Howard, 2 Id. 202; Lovell v. Briggs, 2 New Hampshire, 228; Wiggin v. Day, 9 Gray, 97; Scott v. Williams, 14 Abbot's Practice Reports, 70; Cary v. Hotailing, 1 Hill, 316.

† Jones v. Baker, 7 Cowen, 447.

districts—quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned. It only serves to throw increased labor upon us, and unnecessary expense upon parties. If counsel will not heed the admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions.

The action in this case is brought to recover damages against the defendants for fraudulently obtaining the property of the plaintiffs. It differs materially from that of *Adler* v. *Fenton*, reported in 24th Howard, which is cited to show that the declaration discloses no cause of action. In that case certain creditors, whose demand was not due at the time, brought an action against their debtors and others for an alleged conspiracy to dispose of the property of the debtors, so as to hinder and defeat the creditors in the collection of their demand; and this court held that the action would not lie. The decision proceeded upon the ground that creditors at large have no such legal interest in the property of their debtors as to enable them to interfere with any disposition of it before the maturity of their demands. The creditors in that case possessed no lien upon or interest in the property of their debtors to impair or clog in any respect the right of the latter to make any use or disposition of it they saw proper. The exercise of that right, whatever the motive, violated no existing right of the creditors, and consequently furnished them no ground of action.

The case at bar is not brought upon the allegation that the defendants have fraudulently disposed of their own property, but that they have fraudulently obtained possession of the property of the plaintiffs. It proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were obtained by false and fraudulent representations.

That such representations were made by the defendant,

Mileham, and that by means of them the goods were obtained, was not seriously disputed at the trial. The principal controversy turned upon the connection of the defendant, Lincoln, with the fraudulent acts of Mileham. The declaration alleges that the fraud was a matter of prearrangement between them, and their counsel insisted that proof of such prearrangement was essential to a recovery against Lincoln, but the court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In thus holding we perceive no error. The character of the transaction was not changed, whether Lincoln was an original party in its inception, or became a party subsequently; nor was the damage resulting to the plaintiffs affected by the precise day at which he became a co-conspirator with Mileham. If, knowing the fraud contrived, he aided in its execution, and shared its proceeds, he was chargeable with all its consequences, and could be treated and pursued as an original party. Every act of each in furtherance of the common design was in contemplation of law the act of both.

On the trial declarations of the defendants were received, which related not merely to the transaction which is subject of inquiry in this action, but to similar contemporaneous transactions with other parties. The evidence was not incompetent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible. Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary* v. *Hotailing*,* and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions

* 1 Hill, 317.

to the general rule that other offences of the accused are not relevant to establish the main charge.*

The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise they should not be regarded.

It is possible that the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury. But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an express rule of this court. It embraces several distinct propositions, and a general exception in such case cannot avail the party if any one of them is correct.

JUDGMENT AFFIRMED.

GREEN v. VAN BUSKIRK.

1. A., B., and C. were residents and citizens of New York. A. being indebted to both B. and C., and having certain chattels personal in Illinois, mortgaged them to B. Two days afterwards, and before the mortgage could be recorded in Illinois, or the property delivered there, both record and delivery being necessary by the laws of Illinois, though *not* by those of New York, to the validity of the mortgage as against third parties, C. issued an attachment, a proceeding *in rem*, out of one of the courts of Illinois, and, under its laws, in due form, levied on and sold the property. B. did not make himself a party to this suit in attachment, though

* See also Hall v. Naylor, 18 New York, 588, and Castle v. Bullard, 23 Howard, 172.

Statement of the case.

he had notice of it, and by the laws of Illinois, a right to take defence to it; but after its termination, brought suit in New York against C. for taking and converting the chattels. C. pleaded in bar the proceedings in attachment in Illinois. The New York courts, holding that the only question was B.'s property in the chattels on the day of the attachment; that the existence or non-existence of such property was to be decided by the law of the domicile of the parties, to wit, New York; and finally, that by this law the property was complete in B. on the execution of the mortgage, adjudged, that the proceedings in attachment in Illinois were not a bar. But—

Held, by this court, that by such judgment, the "full faith and credit" required by the Federal Constitution had not been given in the State of New York to the judicial proceedings of the State of Illinois; and that so the judgment below was erroneous.

2. The fiction of law that the domicile of the owner draws to it his personal estate wherever it may happen to be, yields whenever, for the purposes of justice, the actual *situs* of the property should be examined.

3. By the laws of Illinois an attachment on personal property there, will take precedence of an unrecorded mortgage executed in another State where record is not necessary, though the owner of the chattels, the attaching creditor, and the mortgage creditor, are all residents of such other State.

ERROR to the Supreme Court of the State of New York, the case being thus:

The Constitution of the United States declares that "full faith and credit" shall be given in each State to the judicial proceedings of every other State, and that Congress may prescribe the manner in which such proceedings shall be proved and the effect thereof. Congress, by act of 1790, did accordingly provide that they should "have such faith and credit given to them in every other court of the United States as they have by law or usage in the court from which they are taken."

With these provisions in force, one Bates, who lived in Troy, New York, and owned certain iron safes in Chicago, Illinois, in order to secure an existing debt to Van Buskirk and others, executed and delivered (in the State of New York), to them, on the 3d of November, 1857, a chattel mortgage on the safes. Two days after this, one Green, also a creditor of Bates, sued out of the proper court of Illinois a writ of attachment, caused it to be levied on these safes, got

judgment in the attachment suit, and had the safes sold in satisfaction of his debt. At the time of the levy of this attachment the mortgage had not been recorded in Illinois; nor had possession of the property been delivered under it; nor had the attaching creditor notice of its existence. Green, Van Buskirk, and Bates were citizens of New York.

It was admitted on the record that the proceedings in attachment were regular and in conformity with the laws of Illinois; that the cases of *Martin* v. *Dryden* and *Burnell* v. *Robertson*, reported in the Illinois reports,* rightly explained those laws; that Bates was the owner of the safes on the 3d of November, 1857, and that Green was a *bonâ fide* creditor of Bates. After the levy of the attachment Green received notice of the mortgage, and the claim under it, and Van Buskirk and the others, mortgagees, were informed of the attachment; but they did not make themselves parties to it and contest the right of Green to levy on the safes, which they were authorized by the laws of Illinois to do.

By statutes of Illinois,† *any* creditor can sue out a writ of attachment against a non-resident debtor. Under this writ the officer takes possession of the debtor's property. If the debtor cannot be served with process, he receives notice by publication, and if he does not appear, the creditor, on proving his case, has judgment by default, and execution is issued to sell the property attached. These statutes further enact,‡ that mortgages of personal property are void as against third persons, unless acknowledged and recorded, and unless the property be delivered to and remain with the mortgagee.

In this state of the law in Illinois, Van Buskirk sued Green in one of the inferior courts of New York, for taking and converting the safes, sold as already mentioned under the attachment. Green pleaded in bar the attachment proceedings in Illinois. But the court held that the law of New York was to govern the case, not the law of Illinois, though the property was situated there, and that by the law

* 1 Gilman, 187; 5 Id. 282.

† Revised Statutes of 1845, p. 630, seq. ‡ Ib. ch. 20.

of New York the title to the property passed on the execution and delivery of the mortgage, and took precedence of the subsequent attachment in Illinois. This judgment being affirmed in the highest court of the State of New York, Green, assuming that the "faith and credit" which the judicial proceedings in courts of Illinois had by law and usage in that State, were denied to them by the decision just mentioned, took a writ of error to this court, conceiving the case to fall within the 25th section of the Judiciary Act, which gives a writ in cases where, in the highest State court, a clause of the Constitution of the United States is drawn in question, and the decision is against the right, title, or privilege specially set up.

The case having got here, a motion was made in December Term, 1866, to dismiss it for want of jurisdiction; the ground of the motion having been, that the only defence set up in the State court was, that the safes at the time of the seizure and sale belonged to Bates, and that by such seizure and sale Green had acquired his title; that thus the only issue tried and determined in the New York court was the right of property and possession at the time of the seizure.*

But this court overruled the motion to dismiss, and held, that while the question whether the proceedings in the Illinois court had the effect which Green asserted for them, was one to be decided after argument on the merits, yet that the effect which those proceedings had there by law and usage of that State, was a question necessarily decided by the New York court, and decided against the claim set up by Green under the provision of the Constitution quoted, *ante*, on page 140; and that so the case was properly in this court for review.

It was now here for such review; a review on merits.

Mr. Porter, with a brief of Mr. Gale, in support of the judgment below:

The defence in the New York courts was, that the safes

* Green v. Van Buskirk, 5 Wallace, 310.

were Bates's, and were seized and sold as his, under execution in an attachment suit against him. Thus, the leading question was the ownership at the time of the attachment. If the safes were then Bates's, the attachment took effect upon his title; but if they had already passed to his vendees, then the attachment process could not reach them. This leading question of previous ownership, and as to the effect of the sale, as against creditors, necessarily assumed that the Illinois suit and process had their *full effect* of establishing Green in the legal position of attaching creditor of Bates, and entitled, as such, to contest such sale. Whatever interest Bates had, *that*, it was admitted, was bound. The question was, whether he had any interest, a matter which did not depend on the record from Illinois, but on the fact whether the assignment was to be governed by the domicile of the owners or by the *locus rei sitæ*. Full faith and credit was thus given to the record.

The New York courts rightly decided that the sale was governed by the law of sales of New York; for a voluntary transfer of personal property is governed everywhere by the law of the owner's domicile, except, perhaps, as against citizens of the local situation.* Had the question been tried in Illinois, the courts in that State would, therefore, have determined the effect of Bates's sale by the law of his domicile, and, of course, in the same way that it was determined in New York.

This decision, that the New York law governed the sale, was right, for the further reason that the parties, as citzens of New York, were bound by its laws.

Messrs. A. J. Parker and Lyman Trumbull, contra, contended, that the position of the other side, now taken, was just as good an argument against the jurisdiction of the court in the case, as it was on the question of merits. In

* Sill *v.* Worswick, 1 H. Blackston, 690; 2 Kent, § 376; Parsons *v.* Lyman, 20 New York, 103; Burlock *v.* Taylor, 16 Pickering, 335; Van Buskirk *v.* Hartford Ins. Co., 14 Connecticut, 583; Caskie v. Webster, 2 Wallace, Jr., 131.

Reply.

effect it was the argument made on the motion to dismiss for want of jurisdiction. But this court had refused to dismiss, and so decided that the argument was unsound. The question now before the court had been really disposed of in the former case. And it was disposed of rightly.

In the State of Illinois, and in all other States where there is what is called an attachment law, an attachment levied under it is "*a proceeding in rem.*"* Such a proceeding, if there be jurisdiction, is conclusive upon the *res* against all interested in the property, and the attachment issued holds such interest in the property as the defendant, by the laws of the State, had at that time; though nothing beyond.†

If, therefore, the action had been brought by Van Buskirk in the State of Illinois, he could not, on the facts shown, have recovered, but the court then would have said that he had obtained, under the attachment, a good right to the property.

Such being the effect of the judicial proceeding in question in the State of Illinois, we had a right, under the Constitution, and the act of Congress of 1790, to insist that the same force, effect, and credit, should be given to it in the State of New York.‡

The wisdom of the constitutional and statutory provisions in question making this requirement, and the necessity for strictly enforcing them, are apparent in this case, where it is sought by the defendants in error to convert an act which was *lawful* in the State of Illinois, where it was done, and in regard to property being *there*, into a *trespass* in the State of New York, where they chose to bring these suits.

In conclusion, we refer the court to the case of *Guillander* v. *Howell*,§ decided by the Court of Appeals of the State of New York since the decision of this case. In that case the court seems to abandon the position it held in deciding the present case.

Reply:

In *Guillander* v. *Howell*, the attaching creditor was a citi-

* Martin v. Dryden, 1 Gilman, 212.
† Buck v. Colbath, 3 Wallace, 346.
‡ Christmas v. Russell, 5 Id. 290.
§ 35 New York, 657.

zen of the State in which he applied for the benefit of the attachment laws; while here he was a citizen of another State. This is a material point of distinction; for here the parties, as citizens of New York, were bound by its laws.

Mr. Justice DAVIS delivered the opinion of the court.

That the controversy in this case was substantially ended when this court refused* to dismiss the writ of error for want of jurisdiction, is quite manifest by the effort which the learned counsel for the defendants in error now make, to escape the force of that decision.

The question raised on the motion to dismiss was, whether the Supreme Court of New York, in this case, had decided against a right which Green claimed under the Constitution, and an act of Congress. If it had, then this court had jurisdiction to entertain the writ of error, otherwise not.

It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the Supreme Court of New York, in the decision which was rendered.

Whether this was so or not, could only be properly considered when the case came to be heard on its merits; but this court, in denial of the motion to dismiss, *held* that the Supreme Court of New York necessarily decided *what* effect the attachment proceedings in Illinois had by the law and usage in that State; and as it decided against *the* effect which Green claimed for them, this court had jurisdiction, under the clause of the Constitution which declares "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State," and the act of Congress of 1790, which gives to those proceedings the same faith and credit in other States, that they have in the State in which they were rendered.

This decision, supported as it was by reason and authority, left for consideration, on the hearing of the case, the inquiry,

* 5 Wallace, 312.

whether the Supreme Court of New York did give to the attachment proceedings in Illinois, the same effect they would have received in the courts of that State.

By the statutes of Illinois, any creditor can sue out a writ of attachment against a non-resident debtor, under which the officer is required to seize and take possession of the debtor's property, and if the debtor cannot be served with process, he is notified by publication, and if he does not appear, the creditor, on making proper proof, is entitled to a judgment by default for his claim, and a special execution is issued to sell the property attached. The judgment is not a lien upon any other property than that attached; nor can any other be taken in execution to satisfy it. These statutes further provide, that mortgages on personal property have no validity against the rights and interests of third persons, without being acknowledged and recorded, unless the property be delivered to and remain with the mortgagee.

And so strict have the courts of Illinois been in construing the statute concerning chattel mortgages, that they have held, if the mortgage cannot be acknowledged in the manner required by the act, there is no way of making it effective, except to deliver the property, and that even actual notice of the mortgage to the creditor, if it is not properly recorded, will not prevent him from attaching and holding the property.*

The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, get a lien on it; for an attaching creditor stands in the light of a purchaser, and as such will be protected.† But it is unnecessary to cite any other judicial decisions of that State but the cases of *Martin* v. *Dryden*,‡ and *Burnell* v. *Robertson*,§ which are admitted in the record to be a true exposition of the laws of Illinois on the subject, to establish that *there* the

* Henderson v. Morgan, 26 Illinois, 481; Porter v. Dement, 35 Id. 479.

† Thornton v. Davenport, 1 Scammon, 296; Strawn v. Jones, 16 Illinois, 117.

‡ 1 Gilman, 187. § 5 Id. 282.

safes were subject to the process of attachment, and that the proceedings in attachment took precedence of the prior unrecorded mortgage from Bates.

If Green, at the date of the levy of his attachment, did not know of this mortgage, and subsequently perfected his attachment by judgment, execution, and sale, the attachment held the property, although at the date of the levy of the execution he did know of it. The lien he acquired, as a *bonâ fide* creditor, when he levied his attachment without notice of the mortgage, he had the right to perfect and secure to himself, notwithstanding the fact that the mortgage existed, was known to him, before the judicial proceedings were completed. This doctrine has received the sanction of the highest court in Illinois through a long series of decisions, and may well be considered the settled policy of the State on the subject of the transfer of personal property. If so, the effect which the courts there would give to these proceedings in attachment, is too plain for controversy. It is clear, if Van Buskirk had selected Illinois, instead of New York, to test the liability of these safes to seizure and condemnation, on the same evidence and pleadings, their seizure and condemnation would have been justified.

It is true, the court in Illinois did not undertake to settle in the attachment suit the title to the property, for that question was not involved in it, but when the true state of the property was shown by other evidence, as was done in this suit, then it was obvious that by the laws of Illinois it could be seized in attachment as Bates's property.

In order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence, outside of the record, the predicament of the property on which it operated. This was done in this case, and determined the effect the attachment proceedings in Illinois produced on the safes, which effect was denied to them by the Supreme Court of New York.

At an early day in the history of this court, the act of Congress of 1790, which was passed in execution of an express power conferred by the Constitution, received an in-

terpretation which has never been departed from,* and obtained its latest exposition in the case of *Christmas* v. *Russell.*†

The act declares that the record of a judgment (authenticated in a particular manner), shall have the same faith and credit as it has in the State court from whence it is taken. And this court say: "Congress have therefore declared the effect of the record, by declaring what faith and credit shall be given to it;" and that "it is only necessary to inquire in every case what is the effect of a judgment in the State where it is rendered."

It should be borne in mind in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defence. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But, as by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a State the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings.

Attachment laws, to use the words of Chancellor Kent, "are legal modes of acquiring title to property by operation of law." They exist in every State for the furtherance of

* Mills v. Duryee, 7 Cranch, 481. † 5 Wallace, 290.

justice, with more or less of liberality to creditors. And if the title acquired under the attachment laws of a State, and which is valid there, is not to be held valid in every other State, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor.

The Vice-Chancellor of New York, in *Cochran* v. *Fitch*,* when discussing the effect of certain attachment proceedings in the State of Connecticut, says: "As there was no fraud shown, and the court in Connecticut had undoubted jurisdiction *in rem* against the complainant, it follows that I am bound in this State to give to the proceedings of that court the same faith and credit they would have in Connecticut." As some of the judges of New York had spoken of these proceedings in another State, without service of process or appearance, as being nullities in that State and void, the same vice-chancellor says: "But these expressions are all to be referred to the cases then under consideration, and it will be found that all those were suits brought upon the foreign judgment as a debt, to enforce it against the person of the debtor, in which it was attempted to set up the judgment as one binding on the person."

The distinction between the effect of proceedings by foreign attachments, when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defence to justify the conduct of the attaching creditor, is manifest and supported by authority.† Chief Justice Parker, in *Hall* v. *Williams*,‡ speaking of the force and effect of judgments recovered in other States, says: "Such a judgment is to conclude as to everything over which the court which rendered it had jurisdiction. If the property of the citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive."

It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court

* 1 Sandford Ch. 146.

† Cochran v. Fitch, 1 Sandford Ch. 146; Kane v. Cook, 8 California, 449.

‡ 6 Pickering, 232.

that pronounced the judgment in this case, induces us to notice the ground on which they rested their decision. It is, that the law of the State of New York is to govern this transaction, and not the law of the State of Illinois where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by the attachment. The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, "yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined." It has yielded in New York on the power of the State to tax the personal property of one of her citizens, situated in a sister State,* and always yields to "laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State; and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws.

We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails.

* The People ex. rel. Hoyt v. The Commissioner of Taxes, 23 New York, 225.

It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives.

We have been referred to the case of *Guillander* v. *Howell*,* recently decided by the Court of Appeals of New York, and as we understand the decision in that case, it harmonizes with the views presented in this opinion. A citizen of New York owning personal property in New Jersey made an assignment, with preferences to creditors, which was valid in New York but void in New Jersey. Certain creditors in New Jersey seized the property there under her foreign attachment laws and sold it, and the Court of Appeals recognized the validity of the attachment proceeding, and disregarded the sale in New York. That case and the one at bar are alike in all respects except that the attaching creditor there was a citizen of the State in which he applied for the benefit of the attachment laws, while Green, the plaintiff in error, was a citizen of New York; and it is insisted that this point of difference is a material element to be considered by the court in determining this controversy, for the reason that the parties to this suit, as citizens of New York, were bound by its laws. But the right under the Constitution of the United States and the law of Congress which Green invoked to his aid is not at all affected by the question of citizenship. We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other States equal privileges with her own in her foreign attachment laws, that the judgment against the personal estate located in her limits of a non-resident debtor, which a citizen of New York lawfully obtained there, should have a different effect given to it under the provisions of the Constitution and the law of Congress, because the debtor, against whose property it was recovered, happened also to be a citizen of New York.

* 35 New York Reports, 657.

Statement of the case.

The judgment of the Supreme Court of the State of New York is REVERSED, and the cause remitted to that court with instructions to enter

JUDGMENT FOR THE PLAINTIFF IN ERROR.

THE SIREN.

1. A claim for damages *exists* against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although, for reasons of public policy, the claim cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The government, in such a case, stands, with reference to the rights of the defendants or claimants, as do private suitors, except that it is exempt from costs, and from affirmative relief against it, beyond the demand or property in controversy.
2. By the admiralty law, all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them.
   These principles were thus applied:
   A prize ship, in charge of a prize master and crew, on her way from the place of capture to the port of adjudication, committed a maritime tort by running into and sinking another vessel. Upon the libel of the government, the ship was condemned as lawful prize, and sold, and the proceeds paid into the registry. The owners of the sunken vessel, and the owners of her cargo, thereupon intervened by petition, asserting a claim upon the proceeds for the damages sustained by the collision: *Held*, that they were entitled to have their damages assessed and paid out of the proceeds before distribution to the captors.
3. The District Court of the United States, sitting as a prize court, may hear and determine all questions respecting claims arising *after* the capture of the vessel.

APPEAL from the District Court for Massachusetts.

The steamer Siren was captured in the harbor of Charleston in attempting to violate the blockade of that port, in February, 1865, by the steamer Gladiolus, belonging to the navy of the United States. She was placed in charge of a prize master and crew, and ordered to the port of Boston

for adjudication. On her way she was obliged to put into the port of New York for coal, and, in proceeding thence through the narrow passage which leads to Long Island Sound, known as Hurlgate, she ran into and sank the sloop Harper, loaded with iron, and bound from New York to Providence, Rhode Island. The collision was regarded by this court, on the evidence, as the fault of the Siren.

On the arrival of the steamer at Boston, a libel in prize was filed against her, and no claim having been presented, she was, in April following, condemned as lawful prize, and sold. The proceeds of the sale were deposited with the assistant treasurer of the United States, in compliance with the act of Congress, where they now remain, subject to the order of the court.

In these proceedings the owners of the sloop Harper, and the owners of her cargo, intervened by petition, asserting a claim upon the vessel and her proceeds, for the damages sustained by the collision, and praying that their claim might be allowed and paid out of the proceeds.

The District Court held that the intervention could not be allowed, and dismissed the petitions; and hence the present appeals.

Mr. Ashton, Assistant Attorney-General of the United States, argued the case fully, upon principles and authority, maintaining the correctness of the decree below upon several specific grounds, resolvable into these two general ones:

1st. That to allow the intervention would be, in substance, to allow the citizen to implead the government, which, he asserted, was universally repugnant to settled principles; and,

2d. That the question as to a claim upon a prize ship, created after capture, was not within the jurisdiction of a prize court, which, he contended, can deal only with the question of prize or no prize.

Mr. Causten Browne, contra.

Mr. Justice FIELD delivered the opinion of the court.

It is a familiar doctrine of the common law, that the

sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*.*

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property.

But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. In *United States* v. *Ringgold*,† a claim of the defendant was allowed as a set-off to the demand of the government. "No direct suit," said the court, "can be maintained against the United States.

* 8 Peters, 444.

† 8 Ib. 150.

But when an action is brought by the United States to recover moneys in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress." So in *United States* v. *Macdaniel*,* to which reference is made in the case cited, the defendant was allowed to set off against the demand of the government a claim for services as agent for the payment of the navy pension fund, to which the court held he was equitably entitled. The question, said the court, was, whether the defendant should surrender the money which happened to be in his hands, and then petition Congress on the subject; and it was held that the government had no right, legal or equitable, to the money.

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown — which is generally given — when the subsequent proceedings to decree are conducted as in other cases.† In the case of *The Athol*,‡ the court refused to issue a monition to the lords of the admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of

* 7 Peters, 16.

† Coote's New Admiralty Practice, 31.

‡ 1 W. Robinson, 382.

the crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only result of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision.* The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.

It is true, that in case of damage committed by a public vessel a legal responsibility attaches to the actual wrongdoer, the commanding officer of the offending ship, and the injured party may seek redress against him; but this is not inconsistent with the existence of a claim against the vessel itself. In the case of *The Athol*, already referred to, where the liability of the actual wrongdoer is asserted, damages against the vessel were pronounced after an appearance on behalf of the crown had been given by the admiralty proctor.†

The inability to enforce the claim against the vessel is not inconsistent with its existence.

Seamen's wages constitute preferred claims, under the maritime law, upon all vessels; yet they cannot be enforced against a vessel of the nation, or a vessel employed in its service. In a case before the Admiralty Court of Pennsylvania, in 1781, it was adjudged, on a plea to the jurisdiction, that mariners enlisting on board a ship of war belonging to a sovereign independent State could not libel the ship for their wages.

* The Clara, 1 Swabey, 3; and the Swallow, Ib. 30.

† See, also, United States v. Brig Malek Adhel, 2 Howard, 233.

Opinion of the court.

In a case in the English Admiralty Court, a libel having been filed to enforce a claim for seamen's wages against a packet ship employed in the service of the General Post Office, Sir William Scott declined to take jurisdiction until notice was given to the Post Office Department, and he was informed that no objection was taken to the proceeding.* The fact that the court took jurisdiction when the exemption, upon which the government could insist, was waived, shows that a claim against the vessel existed, as only upon its existence could the libel in any event be sustained.

Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government. Thus in Massachusetts the statutes provide, that any person to whom money is due for labor and materials furnished in the construction of a vessel in that commonwealth, shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is paid, unless lost by a failure to comply with certain specified conditions; yet in a recent case, where a vessel subject to a lien of this character was transferred to the United States, it was held that the lien could not be enforced in the courts of that State. The decision was placed upon the general exemption of the government and its property from legal process.†

So also express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises. In *Lutwich* v. *The Attorney-General*, a case cited by Lord Hardwicke in deciding *Reeve* v. *Attorney-General*,‡ a bill was filed to foreclose a mortgage after the mortgagor

* The Lord Hobart, 2 Dodson, 103.

† Briggs and another v. Light Boats, 11 Allen, 157.

‡ 2 Atkyns, 228.

had been attainted for high treason, and the court refused a foreclosure against the crown, but directed that the mortgagee should hold and enjoy the mortgaged premises until the crown thought proper to redeem the estate.

In *Hodge* v. *Attorney-General*,* the deeds of certain leasehold estates had been deposited by one Bailey with the plaintiffs, who were bankers, to secure a balance of a running account between him and them. Bailey was afterwards convicted of felony, and the leasehold estates vested in the crown. At the time of his conviction he was indebted to the plaintiffs, who filed a bill against the attorney-general, claiming to be equitable mortgagees of the leasehold estates, to subject the property to sale, and the application of the proceeds to the payment of the amount due them. But the court said that the only decree which could be made in the case was to declare the plaintiffs to be equitable mortgagees of the property, to direct an account to be taken, and that the plaintiffs hold possession of the property until their lien was satisfied. "I do not think," said Baron Alderson, in giving the decision, "that I have any jurisdiction in this case to order a sale. Here the legal estate is vested in the crown; and I do not know any process by which this court can compel the crown to convey that legal estate."

In this country, where, as a general rule, a mortgage is treated only as a lien or incumbrance, and the mortgagor retains possession of the premises, the relief granted in the two cases cited would be of no avail.

The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. Thus, if the government, having the title to land subject to the

* 8 Younge & Collyer, 342.

mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

So if property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.

Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them. Assuming, therefore, that the Siren was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is no authority, that we are aware of, which would exempt them under these circumstances, because of the exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody.

This doctrine was applied by this court in the case of the *St. Jago de Cuba*,* where a libel was filed by the United States to forfeit the vessel for violation of the laws prohibiting the slave trade. Claims of seamen for wages, and of material-men for supplies, when the parties were ignorant of the illegal voyage of the vessel, were allowed and paid out of the proceeds. These claims arose subsequent to the illegal acts which created the forfeiture, yet they were not

* 9 Wheaton, 409.

superseded by the claim of the government. "In case of wreck and salvage," said the court, "it is unquestionable that the forfeiture would be superseded; and we see no ground on which to preclude any other maritime claim fairly and honestly acquired." This language, though used with reference to claims arising out of contract, may be applied to claims arising out of torts committed after the capture of the offending vessel.

In *United States* v. *Wilder** it was held that goods of the United States were subject to contribution equally with goods of private shippers, to meet the expenses incurred in saving them, which were averaged, and that the owners of the vessel could retain the goods, until their share of the contribution to the average was paid or secured. The United States claimed the right to take the goods without paying or securing this share; and this being denied, the action was brought to recover their value. In delivering the opinion, Mr. Justice Story stated that he was unable to distinguish the case from one of salvage, and that it had never been doubted that in cases of salvage of private ships and cargoes, the freight on board belonging to the government was equally subject to the admiralty process *in rem* for its proportion due for salvage with that of mere private shippers; but that it might be, for aught he knew, different in cases of the salvage of public ships. "The same reasoning, however," continued the learned justice, "which has been applied by the government against the lien for general average, applies with equal force against the lien for salvage of government property under all circumstances. Besides, it is by no means true, that liens existing on particular things are displaced by the government becoming, or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exists in all cases as much against the government, becoming proprietors by way of purchase, or forfeiture, or otherwise, as it does against the particular things in the possession of a private person."

* 8 Sumner, 308.

In the case of *The Schooner Davis and Cargo*, recently decided in the Circuit Court of the United States for the Southern District of New York, cotton belonging to the United States was held liable to contribution to meet the allowance made for salvage services in saving vessel and cargo. "The mere fact," said the court, "of the ownership of the cotton by the government, in the act of being carried to its port of destination for the purposes of a market as merchandise, we think did not exempt it from the lien in case of salvage service. We shall not enter into an argument in support of the position, as the subject, or rather a kindred one—the liability of property of the government for general average—and the present question incidentally have been already most elaborately examined by Mr. Justice Story.* We are inclined, also, to the opinion, that it is the doctrine of the admiralty in England,† and of the most approved modern elementary writers on the subject in this country."‡

There is no just foundation for the objection that claims for maritime torts cannot be dealt with and adjusted by a prize court. "It is a principle well settled, and constantly conceded and applied," said Chancellor Kent, "that prize courts have exclusive jurisdiction and an enlarged discretion as to the allowance of freight, damages, expenses, and costs in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli;* and the courts will frequently award large and liberal damages in those cases."§ The jurisdiction is not, therefore, limited to the determination of the simple question of prize or no prize. But whatever may be the limitation upon the jurisdiction of a prize court in England, there is no such limitation upon the District Court sitting as a prize court in this country. Here, the District Court, as was said in *United States* v. *Weed*,‖ "holds both its

* 3 Sumner, 308.

† 3 Haggard, 246.

‡ 1 Parsons's Maritime Law, 324; 2 Ib. 625; Marvin on Wrecks and Salvage, § 122; see, also, 7 Wheaton, 283.

§ 1 Kent, 354.

‖ 5 Wallace, 69.

prize jurisdiction and its jurisdiction as an instance court of admiralty from the Constitution and the acts of Congress, and is but one court with these different branches of admiralty jurisdiction, as well as cognizance of other and distinct subjects." It may, therefore, hear and determine all questions respecting claims arising after the capture of the vessel. Outstanding claims upon the vessel, existing previous to the capture, cannot be considered. This exclusion rests not on the ground of any supposed inability of the court to pass upon these claims correctly, but because they are superseded by the capture.*

As to the suggestion that a maritime tort, committed by a ship in possession of a prize master and crew, ought not to create a claim on the vessel against a neutral owner in case the vessel is restored, it is sufficient to say, although the vessel having been condemned the question is not of importance in this case, that the claim in that event, if held to exist, would not be the subject of consideration by the prize court. Here, however, the title was divested from the previous owner by the capture, that being lawful, and vested in the United States (in trust as to one-half for the captors), although the legality of the capture was not established until the sentence of condemnation.

It does not appear that the court below considered the evidence as to the character and extent of the alleged tort. It appears to have placed its decision entirely upon the legal proposition, that the captured vessel was exempt from legal process at the suit of the intervenors, and that consequently the proceeds of the vessel could not be subjected to the satisfaction of their claims. We have, however, looked into the evidence, and are satisfied that the collision was the fault of the Siren. It took place in the daytime. The sloop was seen from the steamer in time to avoid her. The steamer was out of the regular track for steamers passing through Hurlgate. The passage is noted for its difficulties and dan-

* The Battle, 6 Wallace, 498; The Hampton, 5 Ib. 372; and The Frances, 8 Cranch, 418.

gers, and, under the laws of New York, pilots are specially commissioned to take vessels through it. The prize master engaged a pilot for the Sound to take the steamer from New York to Boston, but refused to engage a Hurlgate pilot, his reason being to avoid expense. With such a pilot she would have been taken in the regular track of steamers northward of Blackwell's Island, and so close to Flood Rock as to avoid the sloop, as might easily have been done. We do not think it important to cite from the evidence in vindication of our conclusion, especially as it was not seriously contested on the argument that the Siren was responsible for the collision.

The decree must be REVERSED, and the cause remanded to the court below, with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors.

ORDERED ACCORDINGLY.

Mr. Justice NELSON, dissenting.

I am unable to concur in the opinion just delivered. The steamer Siren, having been captured by the United States steamship Gladiolus, a government vessel of war, *jure belli*, became the property of the United States, subject only to the right of the claimant to have the question of the legality of the capture determined by the prize court to which it was sent for condemnation. Captures made by government vessels belong to the government, and no title exists in the captors, except to their distributive shares of the proceeds after condemnation.*

I agree that the Siren, while on her way, after capture, under the charge of the prize master, was in fault in the collision with the sloop Harper, on her passage from the East River into the Sound, and that, if she had belonged to a private owner, she would have been liable, in the admiralty, for all the damages consequent upon this fault. Nor do I make any question as to a lien for the damages against the

* Dos Hermanos, 10 Wheaton, 306; The Aigburth, Blatchford's Prize Cases, 685; The Adventure, 8 Cranch, 226.

vessel in such a case, and which may be enforced by a proceeding *in rem;* or may be by a petition to the court against the proceeds, in the registry, if, for any cause, the offending vessel has been sold, and no prior lien exists against these proceeds. But if the owner of the offending vessel is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the non-liability would amount to nothing. It would be idle to say that the owner was not liable for the wrong, and at the same time subject his vessel for the damages occasioned. In this case, therefore, before a lien can be established or enforced against the Siren by a proceeding *in rem*, for the fault in question, or, which is the same thing, before it can be applied to the proceeds of the vessel in the registry, it must first be shown that the United States, the owner, is legally liable for the collision. In saying legally liable, I do not mean thereby legally liable to a suit; but legally liable upon common law principles in case a suit might have been maintained against the government; in other words, legally liable for the wrongful acts of her officers or public agents. That, in my judgment, is the turning-point in this case, and the principle is as applicable to the proceeds of the Siren in the registry as to the vessel itself. If the government is not responsible, upon the principles of the common law, for wrongs committed by her officers or agents, then, whether the proceedings in the admiralty are against the vessel, or its proceeds, the court is bound to dismiss them.

Now, no principle at common law is better settled than that the government is not liable for the wrongful acts of her public agents. Judge Story, in his work on Agency, states it as follows: "It is plain," he observes, "that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subver-

sive of the public interests." When we take into view the multitude of public officers and agents, which the government is obliged to employ in conducting its affairs, the soundness, propriety, and even necessity of this principle become at once apparent. In our judgment the present case falls directly within it. In all these cases of wrongs committed by public officers or agents, the legal responsibility attaches to the actual wrongdoer.

It is supposed that the liability of government property for salvage or general average contribution, for services or sacrifices, in cases of impending danger to the property, afford some authority for the judgment in the present case. We are unable to perceive any analogy to the principle we have been discussing. There a portion of the property is taken, or appropriated, as a compensation for saving it from a peril that threatened the loss of the whole. The cases involve no principle concerning the liability of the government for the tortious acts of its public officers.

Great stress is laid also upon the circumstance that the United States is the libellant, and has brought the offending vessel or its proceeds into court, and that the proceeding against the fund in the registry is not a suit against the government. But the answer to this is not that the proceeding may not be taken against the fund in the registry, although there is certainly some difficulty in distinguishing between that and a proceeding against the vessel itself, but that the fund which belongs to the government is not liable at all for the wrongful acts of its officers, which wrongful acts lie at the foundation of the judgment rendered in the case. It is for this principle I contend, and for which I am compelled to dissent from the judgment.

DORSHEIMER v. UNITED STATES.

The power intrusted by the act of Congress of March 3, 1797, and that of June 3, 1864, as amended in its 179th section by the act of March 3, 1865, to the Secretary of the Treasury to remit penalties, is one for the exercise of his discretion in a matter intrusted to him alone, and admits of no appeal to the Court of Claims or to any other court.

APPEAL from the Court of Claims.

Dorsheimer, collector of internal revenue at Buffalo, New York, and two others, informers in the case, filed a petition in the Court of Claims to recover from the United States one-half of $220,102, which the government received on a compromise with Sturges & Sons, of a prosecution against property of one Rhomberg, a distiller.

The case was this:

The act of June 3, 1864, "to provide internal revenue," enacts, that any distiller who shall fail to make true entry and report of his stills, liquors, &c., shall forfeit all the liquors made, and all the vessels, stills, &c., and personal property on the premises, &c.; and that these may be seized by any collector, and held by him until a decision thereon according to law.* And by its 179th section gives authority to collectors to prosecute for the recovery of fines, penalties, and forfeitures, in the name of the United States; and confers the right to one moiety of them upon "the collector or deputy collector" who shall first "inform of the cause, matter, or thing, whereby such penalty may have been incurred."†

The amendment to this section in the act of March 3, 1865,‡ gives this to any person who shall first inform, and adds, that when "the penalty is paid *without suit, or before judgment*, and a moiety is claimed by any person as informer, the Secretary of the Treasury shall determine whether any claimant is entitled to such moiety, and to whom it shall be paid."

* 13 Stat. at Large, 305. † Ib. 305. ‡ Ib. 488.

Statement of the case.

An early act—one of March 3, 1797*—confers authority on the Secretary of the Treasury to mitigate or remit any fine, forfeiture, or penalty, incurred by any vessel, goods, or wares, by force of the laws for laying, levying, or collecting any duties or taxes, which, *in his* opinion, shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same.

With these acts in force, Rhomberg, a distiller at Dubuque, Iowa, violated the laws by making false returns, and fraudulently withholding taxes to the amount of $195,000. Upon information furnished by Dorsheimer and the two other persons, his liquors, distilling apparatus, grain, and the cattle at the distillery, were seized, and proceedings for their forfeiture instituted in the several districts of New York, Illinois, and Iowa, where the seizures were made.

After the seizure, Sturges & Sons, of Chicago, intervened, asserting that, without the least knowledge of Rhomberg's fraud, they had made very large advances on the property seized. And they paid to the United States $33,946, *on confession, by Rhomberg, that that amount of taxes had been withheld by him.*

The government, however, still holding on to the property seized, and the suits being in existence, Sturges & Sons entered into negotiations with the Commissioner of the Internal Revenue, who accordingly released the spirits seized, and dismissed the proceedings, excepting in Iowa, taking, in place of them, the bond of Sturges & Sons for $275,000, conditioned,

That, if it should be determined by the commissioner that the said spirits are not subject to the lien of the government for revenue duties, as against the advances made by the said firm, or if the obligors shall pay such sum of money as the commissioner should determine to be due the government for said property seized, then the obligation to be void; it being understood that the obligors are not liable, under the bond, for any penalty which the government may assess against Rhomberg,

* 1 Stat. at Large, 506; made perpetual by act of Feb. 11, 1800; 2 Id. 7.

but only shall be liable for the actual amount of duties found to be unpaid, together with proper costs and charges attending the investigation of the case and seizure of the property.

In the meanwhile the United States continued its prosecution against the distillery, and to prevent the loss which would occur by stopping it, the officers in charge proceeded to use up the raw materials on hand which had been seized, and, in so doing, produced liquors valued at $150,000; the money (about $54,814) required to pay the expenses of so running the distillery, being furnished by Sturges & Sons.

After various negotiations—Rhomberg's fraud standing confessed on the records of the Treasury—the Secretary of the Treasury compromised with Sturges & Sons, thus:

He relinquished to them the distillery and the appurtenances, and also the product of the distillery, namely, the $150,000 worth of liquor, free of tax, and also the moneys received at Dubuque, $54,814; also, the proceeds of the cattle which had been sold, and the liquors seized, with the claim of the United States for forfeiture. The government also surrendered the bond for $275,000, given by Sturges & Sons, and assigned to them a bond given by Rhomberg to the United States. The government, on its part, received $220,102, "which amount the Secretary of the Treasury stated to be composed as follows:"

Deficiency of taxes, ...	$195,102
In lieu of penalties and forfeitures, . .	25,000
	$220,102

This compromise was made in face of a protest of Dorsheimer and his co-informers, against any settlement which should make a distinction between the share to be paid to the government and the share to be paid to them. The secretary professed to make it under the 44th section of the act of 30th June, 1864, which gives him power to "*compromise*" all suits "relating to the internal revenue."

The compromise being made, Dorsheimer and his co-informers claimed from the secretary one-half of the $220,-

102 received. The secretary refused to pay them the half of *that* sum, but was willing to pay them half of the $25,000, this last sum being, as he considered, all that was received in lieu of penalties and forfeiture. Dorsheimer and his co-informers accordingly filed their petition in the Court of Claims, setting forth the facts of the case as above, and claiming the half of the $220,102. The United States demurred, and the demurrer—after argument, in which *The United States* v. *Morris*, reported in 10th Wheaton, 246, was relied on to support it,—being sustained, and the petition dismissed, the case was brought here by the informers on appeal.

Messrs. Dorsheimer and Dick (with whom was Mr. M. Blair), for the appellants:

Invited by statutes relating to the internal revenue, the petitioners below undertook the services mentioned in this case. They thus became employed by the government, and rights accrued to them for their services. When suit was instituted, it was instituted upon a forfeiture given by law; a forfeiture as from the date of the offence committed; and this forfeiture was a "statutory transfer of right."* The right was to the joint use of the government and the informers, and so continued until the final settlement was made.† The interest of an informer is a matter of contract, and a right of property, though, until decree, but an inchoate right, vests; a right which the government cannot affect.‡ No doubt the secretary may remit, in virtue of pre-existing statutes; but this power, says this court in *The Gray Jacket*,§ "is defined and limited by law." The jurisdiction is a special one, and, if transcended, the secretary's act is void.

The compromise could not be sustained at all on the act

* Caldwell v. United States, 8 Howard, 366, 381.

† Jones v. Shore, 1 Wheaton, 462.

‡ The King v. Amery, 2 Durnford & East, 569; In re Flourney, 1 Georgia State, 606.

§ 5 Wallace, 342; and see McLane v. United States, 6 Peters, 404.

of 1797, which gives authority to remit or mitigate only on the ground of innocence. Here the guilt was confessed. And the secretary here made no voluntary or gratuitous surrender of any of the joint rights and claims. On the contrary, he made the most out of them that could be made.

Neither can the secretary, under the power given in the act of 1864 to "compromise," *so* compromise as to destroy the rights of the informers, in the way which he would here seek to do. The secretary stood in the place of the parties interested in the suit, parties who had a joint interest. He had no power, under any proceeding, however named, to divide the interest of the government from that of the officers; nor to settle the controversy upon terms which would make the result of what he did enure to the advantage of one and not of the other. His power extended no further than to agree with the *opposing* claimant, on the division between *him*, such claimant, and the parties represented by the secretary, of the property seized, and what the opposing claimant relinquished belonged to the parties to the suit; belonging to them not *de novo*, but by means of the previously existing title. A compromise is a common end of a suit, well known to the law, and yields fruits which are as thoroughly the avails of the suit as would be those given by a writ of execution. And, indeed, as this mode of terminating these suits is prescribed by the act under consideration, it may be well considered as in the category of process of law for the enforcement of claims under the statute.

The United States v. *Morris** decides nothing more than that the authority to remit the forfeiture is not limited to the period before condemnation or judgment, but that "the authority to remit is limited only by the payment of the money to the collector for distribution." So the court says: "If the government refuse to adopt the informer's acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates." Whence it is inferable that if the government

* 10 Wheaton, 246.

did adopt his acts, and did *not* waive the forfeiture, but, on the contrary, reaped a great benefit from them, that then the informer would be entitled to recover his share of that which the government received by and through the adoption of his acts, and the proceedings upon his information.

In the case now at bar, there was an action instituted by the government upon and as the direct consequence of the collector's proceedings. The only question is whether the money received was the fruit of the action. Clearly it was; for through the proceedings of the collector the government received a large sum; without them it would have received nothing.

The taxes, so called, were not paid by or on behalf of Rhomberg, and no one else was liable for them. No receipt for taxes was given to any one, nor were Rhomberg's interests considered at all in the settlement. The purchasers of the property from him were negotiating with the United States for a confirmation of their title, and asked for and got a sale, transfer, and delivery of the property, clothed with the title which the government had acquired. Sturges & Sons considered the case theirs. Rhomberg was out of the question. The forfeitures by his frauds, standing confessed, had extinguished him.

There is no doubt but that the claimants would have been entitled to the moiety of this sum of $195,102, if the secretary had not called it by the name of taxes. The compromise was simply that the owners paid $220,102, and received back their property, worth $350,000, with a discontinuance of the suit. But the secretary determines within his own mind—*in petto*—that this sum of $220,102 shall be composed of certain elements; a composition wholly imaginary; and that the compromise should consist in his receiving a sum equal to the taxes on a part of the property, and another sum, fixed arbitrarily, which he called the forfeiture. If, after the money had been paid, he had reconsidered his determination, and called the $195,102 forfeiture instead of taxes, the claimants would have been entitled to one-half of this, and the defendant in the other suit would have been

neither injured nor affected; and if, on the contrary, he had reconsidered his determination, and called the $25,000 taxes on some other portion of the property relinquished, the claimants would have been entitled to nothing, and the defendant in the other suit would have been neither benefited nor affected. Now, has the secretary, under a power to "compromise a suit," not only a power to compromise the suit, but an absolute right of distribution over the proceeds? We conceive that the government had a controlling right to abandon the adventure, but we submit that it had no right to remit its partner's share and retain its own.

In conclusion: The claims of the informers are maintained by the general policy of the United States; which is, that whenever the government adopts the acts of the informer, and proceeds upon his discoveries and to his risk, it will share equally with him whatever may be received through his proceedings; a policy which has never been departed from since the establishment of the government, has been clearly indicated by its statutes, and repeatedly maintained by this court.

Mr. Talbot, contra:

The only question is, whether the $195,102 was penalty.

The Secretary of the Treasury states that it was not received as penalty. And beyond the statement of this officer, this court will make no inquiry. That statement will be deemed sufficient to sustain the demurrer.

But if the court look into the admitted case, it corroborates this representation of the secretary.

There was a confessed deficiency of $195,000 taxes, and $33,946 was paid soon after the seizure, upon a confession of so much deficiency of taxes. The bond given by Sturges & Sons was to secure payment of unpaid taxes.

To these statements of fact it is no answer to say even that the action of the secretary was not authorized by law. Whether brought about lawfully or otherwise, the result, namely, the non-payment of the sum of $195,102, or of any part thereof, as penalty, takes away the foundation of this

claim. For this is a claim not for damages, because the Secretary of the Treasury has unlawfully prevented a moiety from accruing to the appellants, but for a moiety which they allege did accrue. Nor does it avail the appellants that what was received ought to have been received as penalty. It is enough in support of the demurrer to show that, in fact, it was not paid and received as penalty.

Further. The act of the secretary in discontinuing these proceedings upon full payment of the taxes withheld, and of $25,000 in lieu of fines and penalties, was within the scope of authority conferred by the 44th section of the act of 1864, to compromise all "suits relating to internal revenue."

Mr. Justice GRIER delivered the opinion of the court, and having quoted the act of March 3d, 1797, and the 179th section of that of June 3d, 1864, as amended in the act of March 3d, 1865, all as already given in the statement of the case,* proceeded as follows:

The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes.

As the great object of the act "to provide internal revenue" is to collect the tax, the Secretary of the Treasury has no power to remit *it*. When the primary object of collecting the tax is obtained, as in the present case, the further infliction of penalties is submitted entirely to the discretion of the secretary. No discretion is given to the courts to act in the case further than to give their judgment; and if the penalties are not mitigated or remitted by the secretary, either before or after judgment, to enforce them by proper process.

The subject has been carefully examined by this court in

* *Supra*, pp. 166–7.

the case of *United States* v. *Morris*,* where it is decided "that the Secretary of the Treasury has authority, under the remission act of March 3d, 1797, to remit a forfeiture or penalty accruing under the revenue laws at any time, *before or after judgment*, for the penalty, until the money is actually paid over to the collector," and that "such remission extends to the shares of the forfeiture or penalty to which the officers of the customs are entitled, as well as to the interests of the United States."

The court say that, "It is not denied but that the custom-house officers have an inchoate interest upon the seizure; and it is admitted that this may be defeated by a remission at any time *before* condemnation. If their interest before condemnation is conditional, and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest as against the claimant. These officers, although they may be considered parties in interest, are not parties on the record, and it cannot be said with propriety, that they have a vested right in the sense in which the law considers such rights. Their interest is still conditional, and the condemnation only ascertains and determines the fact on which the right is consummated, should no remission take place." The right does not become fixed until the receipt of the money by the collector.

If these well-settled principles be applied to the case before us, its solution is easy.

It was the first duty of the collector to collect the amount of duties or taxes on the property seized. The secretary had no right to mitigate, remit, or compromise that amount. Persons who had advanced money on the property in good faith offer the whole amount of the tax due, and finally agreed to pay the sum of $25,000 to have the penalties remitted. This offer was accepted, and the further prosecution of the suits was consequently ended.

The power intrusted by law to the secretary was not a

* 10 Wheaton, 246, 287.

Statement of the case.

judicial one, but one of *mercy*, to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal. Even if we were called upon to review the acts of the secretary, we see no reason to doubt their correctness, or that of the judgment of the Court of Claims in dismissing the case.

DECREE AFFIRMED.

The CHIEF JUSTICE and Mr. Justice NELSON dissented.

SUPERVISORS v. ROGERS.

1. The act of February 28th, 1839 (§ 8, 5 Stat. at Large, 322), providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most convenient Circuit Court in the next adjacent State, is not repealed by the act of March 3d, 1863 (12 Stat. at Large, 768), providing that under certain circumstances named in *it*, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time.
2. A court of the United States has power to adopt in a particular case a rule of practice under a State statute; and where a Circuit Court is possessed of a case from another circuit, under the above-mentioned act of 1839, it may adopt the practice of the State in which the Circuit Court from which the case is transferred comes, as fully as could the Circuit Court which had possession of the case originally.

ERROR to the Circuit Court for Northern *Illinois*. The case, which involved two points, being this:

1. An act of Congress of the 28th of February, 1839,* provides, that in all suits in any Circuit Court of the United States, in which it shall appear that both the judges, or the one who is solely competent to try the same, *shall be in any way interested*, or shall have been counsel, or connected with either party so as to render it improper to try the cause, it shall be the duty of such judge, or judges, on the applica-

* § 8, 5 Stat. at Large, 322.

tion of either party, to cause the fact to be entered on the records of the court and make an order, that an authenticated copy thereof, with all the proceedings in the suit, *shall be forthwith certified to the most convenient Circuit Court in the next adjacent State*, or in the next adjacent circuit, which Circuit Court shall, upon such record and order being filed with the clerk, take cognizance thereof in the same manner as if such suit had been rightfully and originally commenced therein, and shall proceed to hear and determine the same; and the proper process for the due execution of the judgment or decree rendered therein, shall run into and be executed in the district where such judgment or decree was rendered; and, also, into the district from which such suit was removed.

A subsequent act, one of March 3d, 1863,* provides, that whenever the judge of the Supreme Court for any circuit, from disability, absence, the accumulation of business in the Circuit Court in any district within his circuit, or from his having been counsel, *or being interested in any cause pending*, or from any other cause, shall deem it advisable *that the Circuit Court should be holden by the judge of any other circuit*, he may request, in writing, the judge of any other circuit *to hold the court in such district* during a time named in such request.

With these two acts on the statute-book one Rogers had brought suit, in the Circuit Court for *Iowa*, against the supervisors of Lee County, to recover the interest due by the county on certain bonds which it had issued, and for the payment of which interest, a tax was by the statutes of the State to be levied.

Having obtained a judgment against the county, and issued execution without getting any satisfaction, he applied to the same court for an alternative writ of mandamus upon the board of county supervisors (whose duty it was, by the laws of Iowa, to levy all taxes levied), to levy a tax sufficient to pay his judgment, or to show cause for not doing so. The writ having issued, the supervisors made a return showing cause, or what they set up as such. The case sub-

* 12 Stat. at Large, 768.

sequently coming on for further proceeding, and both the judges of the Circuit Court for Iowa being interested in the matter as tax-payers of the county of Lee, the case was ordered to be transferred to the Circuit Court for the Northern District of *Illinois*.

Being now in that court, a motion was made to remand it, on the ground that the act first above quoted, the act, namely, of 1839, had been repealed by the subsequent one of 1863, and that, under this last act, if the two judges of the Circuit Court for Iowa were interested in the case, a circuit judge of some other district should have been requested to hold a court *in the Iowa circuit, the case* being left *there*. Instead of this the *case* had been transferred and the judge had been left in his district. *The motion was, however, denied.*

2. The case being thus in the Circuit Court for Northern Illinois, and a peremptory writ having issued thence, and the supervisors having refused to obey it, the relator's counsel moved that a writ should be issued "according to section 3770 of the code of Iowa," directed to the *marshal of the United States* for the district of Iowa, and commanding *him* to levy and collect the taxes named in the peremptory writ.

This section, 3770 of the code of Iowa, upon which the motion for the appointment of the marshal was based, is found in a chapter of the Iowa code, regulating proceedings in mandamus. It thus enacts:

"The court may, upon application of the plaintiff (besides or instead of proceeding against the defendant by attachment) direct that the act required to be done may be done by the plaintiff, *or some other person appointed by the court*, at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court, as the court or judge may order; and the court may render judgment for the amount of such expense and costs, and enforce payment thereof by execution."

The court below accordingly issued the writ to the marshal, "commanding him to levy and collect the taxes named in the said peremptory writ, and when collected to pay said

judgment, interest, and costs therein named," and in performing the said duty, requiring him to conform to the laws of the State of Iowa, for the collection of State and county taxes, as near as might be.

The case being here on error, it was alleged that the court below erred,

1. In overruling the motion to remand the cause to the Circuit Court of the United States for the District of Iowa; and,

2. In making an order for the appointment of the marshal of the United States, as a commissioner, to levy and collect the tax upon the property of Lee County.

Mr. McCrary, for the plaintiff in error, contended, that the act of 1863 was intended to supersede that of 1839. Great convenience and advantage arose to suitors, witnesses, attorneys, and others, by providing for calling a neighboring judge to try such cases. It was vastly more easy for a judge to come into an adjoining circuit than for counsel and witnesses to go by hundreds from State to State.

Several reasons might be assigned in support of the second allegation of error; but a conclusive one, he argued, was, that so far as anything appeared here, the chapter of the Iowa code on which the court acted in appointing the marshal, had never been adopted by the Federal court below as one of its rules of practice. It thus had no force in that court.* The decision in *Riggs* v. *Johnson County*† last winter, on the subject of mandamus in this class of cases, was based expressly upon the ground that the rules and practice of the court authorized the issuing of writs of mandamus to enforce the levy of taxes in these cases, and it was upon a full review of the acts of Congress concerning the practice of the courts, that this conclusion was reached.

Messrs. Grant and Dick, contra,

1. Went into a minute examination of the act of 1839, and that of 1863, contending that the provisions were able to

* Smith v. Cockrill, 6 Wallace, 756. † Ib. 166.

stand together, and were thus but cumulative. They gave two modes of proceeding where the judges were interested, &c. Either could be adopted, as was most convenient in the circumstances. The learned counsel contended—

2. That the chapter of the Iowa code in question, if never otherwise adopted, had been sufficiently adopted for this case, by being completely acted upon in it.

Mr. Justice NELSON delivered the opinion of the court.

I. It will be observed on a comparison of the act of 1839 with the subsequent one of 1863 that they are very different from each other in their general purpose, scope, and intent. The first provides only for the removal and trial of a suit in which the judges are disqualified to try the particular cause on account of interest, or having been counsel or connected with either party. The second act is more general, and in the events named the judge is to be invited to hold the court for a given session or term, to be named. It is true that the reasons assigned in the section for calling on the judge embrace two of those assigned in the act of 1839 for the removal to an adjacent court, namely: interest, and having been counsel; but this enumeration is not of much importance in the interpretation of the act, for after the enumeration it is added, or "from any other cause;" so that the judge would be authorized for a cause not enumerated to call in the judge to hold a session for any time specified, and during which he would no doubt be fully competent to try any cause coming even within the enumeration. The frame of the section, we think, shows that the main purpose of the provision was to procure a judge to hold a session or term of the court, and not to try a particular cause which the resident judge was incompetent to try. But the more decisive difference between the two acts is that the power conferred by the latter is permissive and discretionary, whereas the former is express and mandatory. The action of the judge in the latter act depends upon the question whether or not he *deems it advisable that the circuit judge of another circuit shall be called in;* in the former it is *made the duty of the judge, on the appli-*

cation of either party, to cause the fact to be entered in the records of the court, and to make the order of removal. In the latter act it is also discretionary with the judge requested to hold this circuit. The condition of his own circuit may render it inexpedient, or his refusal unavoidable; in the former it is the duty of the circuit to which the cause is removed to take cognizance of the same and try it as if originally brought in that court. We are of opinion therefore that there is no necessary repugnancy between the two acts, and although in some particulars the two provisions have reference to the same subject, and for the purpose of remedying a common inconvenience, there are no negative words in the latter act, and to this extent the remedy may be well regarded as simply cumulative.

II. The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment.

This depends upon a provision of the code of the State of Iowa. The provision is found in a chapter regulating proceedings in the writ of mandamus; and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, fine, and imprisonment. It is given by way of an alternative proceeding in execution of the peremptory writ in lieu of the attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State, and the peremptory mandate of the court.

This section is but a modification of the law of England and of the New England States, which provide for the execution of a judgment recovered against a county, city, or town,

against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people.

It is said that this practice prescribed for the State courts of Iowa has not been adopted by the United States circuit for that district, and hence that it is not competent for the court in the present instance to follow this mode of proceeding. But the answer is that the court having charge of the cause under the act of 1839, is fully competent to adopt it in the particular case, as its power is the same over it as if it had been a suit originally brought in the court.

JUDGMENT AFFIRMED.

Mr. Justice MILLER did not sit in this case.

LEE COUNTY v. ROGERS.

1. The principle of law held by this court in *Gelpcke* v. *The City of Dubuque*, (1 Wallace, 176-228)—the principle, namely, that bonds, issued by counties, cities, or towns, in Iowa, to railroad companies, for stock in such companies; and which said bodies, at the time the bonds were issued, were held, by the settled adjudications of the highest courts of the State, to possess full power, under its constitution and laws, to issue the same, are ever after valid and binding upon the body issuing them, in the hands of a *bonâ fide* holder, although the same courts may subsequently reverse their previous decisions—is not open for re-examination in this court.
2. The doctrine of *lis pendens* has no application to a case where there were three distinct and independent suits, with an interval of one year between the first and second, and of two years between the second and third.

IN error to the Northern Circuit Court of Illinois.

Rogers brought suit against Lee County, Iowa, upon the coupons of certain bonds signed by one Boyles, county judge, issued by the county under the county seal, to a certain railroad company named.*

* The suit was originally brought in the Iowa circuit, but like the last one was transferred to Illinois. The preceding case renders further allusion to this fact unnecessary.

The defences, as appearing on answer and amended answer, were:

1. That the bonds were issued and executed by Boyles, county judge, &c., "without any authority of law, having been issued for the purpose of subscribing on behalf of this defendant to the stock of certain railroad corporations, which the defendant had no power or authority to do," and that they were "utterly null and void from the beginning."

2. That a bill had been filed by McMillan and others, taxpayers of Lee County, against Boyles, the county judge, &c., on the 1st October, 1856, in a State court, before any bonds were issued, and that he was enjoined, on account of irregularities in preliminary proceedings, at the December Term, 1856, against issuing the bonds; that soon afterwards, in January, 1857, the legislature passed an act confirming and legalizing these proceedings; that a second bill was filed, by the same parties, on the 26th February, 1859, a year after this act of the legislature, for the purpose of having both the act, and also the bonds, which, in the meantime, had been issued, declared void, and that on the 22d June, 1858, a decree was rendered, declaring both the act and the bonds valid and binding; that a third bill was filed, which was a bill of review of the previous case, on the 28th July, 1860, two years after the previous decree, and that on the 18th October, 1862, a decree was rendered declaring the act of the legislature, and bonds, void and of no effect.

The defence meant to be set up by this second head was, of course, that of *lis pendens*.

The defendant demurred, and the court below sustaining the demurrer, the case was now brought here by the county.

It was submitted by Mr. McCrary, on elaborate briefs of his own, and of Messrs. Semple and Casey; and by Messrs. Dick and Grant, on similar briefs of theirs.

Mr. Justice NELSON delivered the opinion of the court.

The defence is placed, by the learned counsel for the defendant, in his brief, upon two grounds:

Opinion of the court.

1. That the county is not liable, on the bonds or coupons, for the reason there was no power in the county to subscribe for the stock, to the railroad company, or to issue the bonds; that they are void, as against the constitution and laws of the State.

2. That prior to the date of the bonds and coupons, certain suits were instituted, in the District Court of Lee County, impeaching the validity of the bonds, if issued, and charging that they would constitute no indebtedness against the county, and claiming that the county judge, who was the fiscal agent of the county, should be enjoined from issuing the bonds; that an injunction was granted, and that the bonds were issued, *lite pendente*, and put on the market, with full notice of the pendency of the suit; that this suit was continuously and successfully prosecuted, and the courts of the State had adjudged the bonds to be null and void, and the collection of the same perpetually enjoined.

I. As to the power or authority of the county to subscribe for railroad stock, and to issue bonds therefor.

Much the largest portion of the brief of the counsel is devoted to a very able discussion of this question. But, after the decision of this court in the case of *Gelpcke* v. *The City of Dubuque*,* and the series of cases following it, we must decline a re-examination of the question. We regret the difference of opinion on the subject of these bonds, between this court and the courts of the State of Iowa; but it involves a principle and rule of property, in our opinion, so just, and so essential to the protection of the rights of the *bonâ fide* holder of this class of securities, that, however much we may respect the judgment of those differing from us, we cannot give up our own. That difference, as we understand it, consists in this: This court held, in *Gelpcke* v. *The City of Dubuque*, that bonds, issued by counties, cities, or towns, in Iowa, to railroad companies, for stock in said companies, and which said bodies, at the time the bonds were issued, were held, by the settled adjudications of the

* 1 Wallace, 176–228.

highest courts of the State, to possess full power, under its constitution and laws, to issue the same, are ever after valid and binding upon the body issuing them, in the hands of a *bonâ fide* holder. Since these bonds were issued, and in the hands of *bonâ fide* holders for value, the courts of Iowa have reversed their previous decisions, and now hold that these bodies possess no such power under the constitution and laws of the State, and hence they are void, even in the hands of the *bonâ fide* holder. The learned and elaborate argument of the counsel for the plaintiff in error, in this case, is devoted to the support of these more recent decisions, and the earnestness and care with which he has discussed the question, Which series of cases shall prevail? leave no doubt of the sincerity of his conviction. But, for the reasons stated, we must respectfully decline following him.

II. The second ground of defence involves the question of notice to the plaintiff below, or, in other words, the effect of the *lis pendens*, as claimed by the counsel. In order to examine this branch of the defence, understandingly, it will be necessary to recur, for a few moments, to the facts as they appear in the answer.

The first suit, by *McMillen and others* v. *Boyles County Judge*, was commenced by petition or bill, October, 1856, and terminated in a decree to enjoin the defendant, December Term thereafter.

The opinion of the Supreme Court, in this case, is in the record.* The court held, the election, by the voters in the county, under the direction of the county judge, to have been irregular in several particulars, as not being in conformity to the act providing for a submission of the question of subscribing for the stock and issuing the bonds. At this time it does not appear that any stock had been subscribed for or bonds issued. The question was presented, in this case, and pressed by counsel for the petitioner, whether or not the county possessed competent power to issue the bonds under the constitution and laws of the State?

* Reported in 8 Iowa, 811.

Opinion of the court.

Judge Stockton, who delivered the opinion, as it respects this question, observed, "We do not deem it expedient or necessary, at the present time, to enter into an examination of the other questions presented and discussed by counsel. Their inherent importance, and the great interest felt in their decision by a large portion of the people of the State, admonish us of the patient study and deliberation with which their investigation must be attended. Another reason, he observes, which has had its weight with us, is, it is understood that the questions raised have been pressed upon, and decided by, the former members of this court, in the case of the *County of Dubuque* v. *The Dubuque and Pacific Railroad Company*."

Soon after this decision, the legislature being in session, an act was passed to cure the defects in the proceedings before the county judge, in the submission of the question to the voters, which became a law on the 29th January, 1857. This act is very comprehensive. After confirming the proceedings in the first section, it declares that "the subscriptions made by said county, &c., and the bonds of said counties, &c., issued in pursuance of said votes and subscription, or hereafter to be issued, are hereby declared to be legal and valid; and that all such bonds issued, and hereafter to be issued, in pursuance of such votes and subscriptions, shall be a valid lien upon the taxable property of said county, &c."

The second section is equally emphatic. It provides, that "the county judge, &c., or other proper authorities of said county, &c., shall levy and collect a tax to meet the payment of the principal and interest of such bonds; and the counties, &c., shall not be allowed to plead in any suit brought to recover the principal or interest of such bonds, that the same are usurious, irregular, or invalid, in consequence of the informalities cured by this act."

The third section re-affirms the validity of all bonds heretofore issued by the county, and the subscriptions to the railroads, notwithstanding any informalities or irregularities in the submission of the question to the vote of the people.

A second suit was brought by petition or bill, by McMillen and others, against the judge of the county, on the 26th February, 1858, to enjoin him from levying a tax, and to have the confirmatory law declared to be unconstitutional, and the bonds void. This suit was commenced more than a year after the passage of the act; and such proceedings were had therein, that the District Court of the County of Lee dismissed it; and, on appeal, this decree was affirmed on the 22d June, 1858. The opinion of the court is in the record.* It was delivered by Chief Justice Wright. He observes, "The power of a county to take stock in a company organized for the purpose of constructing a railroad, or other public improvement, through the same, has been recognized by a majority of this court in the following cases." He then refers to *Dubuque* v. *Dubuque and Pacific Railroad Company*,† *Leech* v. *Bissel, County Judge of Cedar County*, and *Clapp* v. *Cedar County*,‡ and *Ring* v. *Johnson*, decided at the present term.§ He adds, "While I have never concurred in this ruling, and still deny the power, yet it may now, as I suppose, be regarded as settled." He then examines the question whether the legislature had power to pass the act of 29th January, 1857; and whether it had the effect of legalizing the vote taken in Lee County, and comes to the conclusion that the legislature was perfectly competent to legalize and make valid the proceedings before the county judge.

This decision of the highest court of the State upon the power of the county to issue the bonds, of which those in question are a part, and also upon the power of the legislature to confirm the irregularities committed in the preliminary steps to their issue, would seem to have put an end to any controversy concerning them. They have the sanction of both the legislative and judicial departments of the State. Higher authority could not be invoked in their favor. If the holders or purchasers cannot confide in these sanctions in

* Reported in 6 Iowa, 391.
† 4 Green, 1.
‡ 5 Iowa, 15.
§ 6 Id. 265.

parting with their money, they may well despair of any safety or security in their dealings in them.

Now, what is the answer to all this authority?

On the 28th July, 1860, two years after this judgment affirming the validity of the bonds, a petition or bill of review was filed in a district court for the purpose of obtaining a re-examination of the judgment; and such proceedings were had, that on the 18th October, 1862, the Supreme Court adjudged that the bonds and coupons, together with the vote of the county of Lee, by which it is claimed they were authorized, and the subscription to the stock of the railroad companies, and all other acts and things done in and about the premises by the county judge and his predecessors in office, and the levy of taxes, &c., are all unauthorized by law and utterly void; and that the act of the legislature curing or attempting to cure the irregularities in the vote of the county are also held to be null and void. This case is reported in 14 Iowa, p. 107. It is due to the learned counsel for the plaintiff in error to say, that he does not put this branch of the defence on the ground that the last decision in the case should prevail over the prior one holding the bonds to be valid, after the legislative sanction; but puts it on this ground in his own words, namely: "That the court erred in sustaining the demurrer to the answer and amended answer of defendant, in so far as they set up the pendency of a suit to cancel said bonds at the time of their issue, and at the time of plaintiff's purchase, and which suit being continuously prosecuted resulted in a decree declaring invalid the bonds."

Now, there are two answers to this ground of defence: First, the suit brought to enjoin the issuing of the bonds for irregularities in the vote of the county, and the judgment enjoining the judge was disposed of by the confirmatory act of the legislature. By that act the irregularities were cured, and the bonds already issued or thereafter to be issued were declared valid. After this act notice was an element of no importance. The suit was at an end. The whole foundation on which it rested was removed. This was so regarded

by the plaintiffs, for two years afterwards they brought a second suit to have the bonds declared void for want of power in the county to issue them; and also the act of the legislature for the want of power to confirm the irregularities in the vote. The decision in that case, however, as we have seen, was adverse to both these propositions.

In the second place, there was no pending litigation from the commencement of the first suit to the termination of the last, namely, from the 15th of October, 1856, to the 18th of October, 1862.

There were three distinct and independent suits, with an interval of one year between the first and second, and of two years between the second and third. The doctrine of *lis pendens*, therefore, has no application to the case.

JUDGMENT AFFIRMED.

Mr. Justice MILLER did not sit in this case.

GORDON v. UNITED STATES.

1. An act of Congress referring a claim against the government to an officer of one of the executive departments, to examine and adjust, does not, even though the claimant and government act under the statute, and the account is examined and adjusted, make the case one of arbitrament and award in the technical sense of these words, and so as to bind either party as by submission to award.

   Hence a subsequent act repealing the one making the reference (the claim not being yet paid), impairs no right and is valid. *De Groot* v. *United States* (5 Wallace, 432) affirmed.
2. *Semble* that the court does not sanction the allowance of interest on claims against the government.

APPEAL from the Court of Claims; the case having been thus:

The legal representatives of George Fisher, deceased, by petition represented to the court just named, that during the lifetime of the said George, and in the year 1813, a large amount of his property in Florida was taken or destroyed by the troops of the United States. That before his

decease, the said Fisher made application to Congress for compensation for the loss and destruction of his property. That after his decease this application was renewed by his legal representatives. That after a delay of several years, Congress, in 1848, passed an act for the relief of such representatives, authorizing and requiring the Second Auditor of the Treasury Department to examine and adjust their claims on principles of *equity and justice*, having due regard to the proofs, for the value of the property taken or destroyed; providing that the said representatives should be paid for the same out of any money in the treasury not otherwise appropriated. This law also enacted, that if it should be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property destroyed by the troops, and by the Indians, respectively, it should be lawful for the accounting officer to apportion the losses caused by the two respectively, in such manner as the proofs should show to be just and equitable, so as to afford a *full and fair indemnity* for all losses occasioned by the troops; but nothing was to be allowed for property destroyed by the Indians.

That this act of Congress was accepted by the claimants, and that the auditor proceeded to examine and adjust the claims under it. That the auditor refused to receive and consider certain depositions presented by the claimants, because he did not consider them properly authenticated. That the auditor made what the petition states to be "an award" on the 22d April, 1848, allowing one-half of the value of such property as he considered the proof established had been destroyed, assuming, as is alleged, that one-half of the destruction was occasioned by the Indians, and not by the troops. This award amounted to $8873, and did not, as was alleged, include interest or compensation for the losses and injuries sustained.

That in December, 1848, the auditor (at whose instance did not appear) reconsidered the case, corrected an error in calculation of $100 in favor of the claimants in his former report, and allowed *interest* on the amount as corrected by

him, being $8973, from 1832, the date of the first application for relief, to the date of the allowance in 1848; which interest amounted to $8997.94. Not satisfied, the complainants demanded interest from the time of the loss until the award, at the rate of interest allowed in Florida. What that rate was did not appear. This renewed controversy was submitted by the auditor and the claimants to the attorney-general of that day, who gave an opinion that *interest at the rate of* 6 *per cent. should be allowed* from the date of the loss to the time of the allowance. Upon this a further allowance of interest was made by the auditor, amounting to $10,004.89. All which allowances were granted under the original act of April 12, 1848, and were paid to the claimants as fast as the auditor furnished his statements.

The claimants, still feeling aggrieved, renewed their application to Congress, and asked relief from the ruling of the auditor; complaining that he had excluded certain depositions, which he deemed not properly authenticated. Thereupon, on December 22, 1854, Congress passed a supplemental act, directing the auditor to re-examine the case, and to allow the claimants the benefit of the depositions theretofore rejected, provided they were then legally authenticated, the adjustment under this supplemental act to be made in strict accordance with the previous act. What steps, if any, were taken under this supplemental act by the auditor, was not stated.

On the 3d of June, 1858, a joint resolution was passed, devolving upon the Secretary of War the execution of the supplemental act above referred to, directing him to proceed *de novo* to execute the act and its supplement according to their plain and obvious meaning, but to deduct from any amount which might be found *justly and equitably due* to the claimants all sums which had been previously paid.

The Secretary of War proceeded to examine the case, and estimated the value of the property destroyed at a sum higher by $158 than the auditor had done; but he also found that all the property had been destroyed by the troops, and none of it by the Indians. Thereupon he allowed for the

entire value of the property, instead of half its value, and added *interest from the date of the destruction*, making a further sum of $39,217.50. This sum was also paid to the claimants.

Still dissatisfied, another petition was presented by the claimants to Congress, and on the 1st of June, 1860, another joint resolution was passed, authorizing and requiring the Secretary of War to revise his execution of the supplemental act aforesaid, and on such revision to give effect to all the testimony filed, including the depositions formerly rejected by the auditor, and to restate and resettle the account, and to make such corrections in his former statement and settlement, and such further allowances, if any, as, in his opinion, *justice to the claimants* should require. The Secretary of War (then Mr. Floyd) did revise his statement and resettle the account; and on the 23d November, 1860, stated his conclusions in favor of the claimants, making a further allowance of $66,519.85.*

The object of the petition now filed in the Court of Claims was, to obtain from this court a judgment for this further allowance of $66,519.85.

It appeared, however, that on the 2d of March, 1861, Congress had passed a joint resolution declaring the resolution of the 1st of June, 1860, under which the Secretary of War had made the last allowance, rescinded, and pronounced the same and all the proceedings under it null and void.

But the petitioners averred, that this repealing resolution was passed without their knowledge or consent, and without notice to them. By reason of it they had not been paid.

The petition was demurred to by the United States.

The court below, considering that there was no cause of action set up in the petition save that founded upon the finding of the Secretary of War, under the resolution approved June 1, 1860, styled an award, and holding that that resolu-

* The entire sum thus allowed, it was said by the court below, was composed of interest. But this statement was alleged by the claimant to be a mistake.—REP.

Arguments for the appellant and appellee.

tion, and all action under it, became null by the repeal of March 2, 1861, sustained the demurrer and dismissed the petition.

The only question, therefore, presented here, was, whether the court below gave a proper construction to the repealing resolution of March 2, 1861. It was, however, asserted by the claimant, that if this construction was erroneous, this court ought to give the same judgment which the court below should have given, to wit: a judgment for the amount of the award with interest. The whole subject of interest, as allowed in the awards, was also made a matter of discussion.

Mr. Bennett, for the appellant, contended, that an award having been made under the law of 1860, the repeal of the law of 1861 could not divest it. Rights had vested. "In such a case," says Dr. Bouvier,* "the rights acquired are left unaffected." That in fact the arbitrator having made and published his award, the resolution of June 1st, 1860, was executed, and nothing remained to be repealed. The case came thus within the principle of *Bayne* v. *Morris*.†

As respected interest: All money due and unpaid properly draws interest. An exception is made in favor of governments, because they are presumed to be always ready to pay, and that any non-payment is owing to the fault of the creditor in not presenting his claim. Here the presumption is rebutted in every part of the case. As respected the *awards* of interest (though they were not now in question) they were right, both on general principles and under the statute. The case was to be settled "on principles of equity and justice." There was to be "a full and fair indemnity."

Mr. Norton, contra, argued, that *Bayne* v. *Morris* was the case of an "award" in its proper sense, and was not applicable to this case; that on the contrary, the finding of the secretary in cases like this had been decided in *De Groot* v. *United States*‡ not to be an "award," nor in that sense binding.

* Law Dictionary, title "Repeal." † 1 Wallace, 97. ‡ 5 Id. 432.

The whole matter of interest was therefore unimportant, though the court could hardly fail to disapprove such allowances as had been made here.

Mr. Justice GRIER delivered the opinion of the court.

The case of Ferreira* was the first to bring before us these claims, under the treaty with Spain in 1819. This was in 1857, more than thirty years after the date of the treaty. In the opinion of the Chief Justice in that case,† will be found a concise history of the previous legislation of Congress on this subject. That case was brought here by way of appeal as from the judgment of the District Court of Florida. And this court was *importuned* to give some utterance by which the Secretary of the Treasury might be justified in a departure from the rule adopted on the subject, with regard to the allowance of interest. In the argument of the case the Attorney-General said, stating the matters as historical facts:

"The first of these claims was presented to the Sectetary of the Treasury for payment in the year 1825, and others have been constantly and successively presented from that time to the present. The number of claims thus presented was about two hundred, and the amount paid has exceeded one million of dollars. But from the first, and in every case where interest has been allowed by the Florida judge, the principal only was paid, and the interest disallowed by the Secretary of the Treasury. For the last twenty-five years this has been the unvaried and uniform course of decision and action by every successive Secretary of the Treasury who has acted on the subject, sustained by the official opinions of several attorney-generals, without the express dissent of any one of them officially declared."

But notwithstanding the persistent importunity of the parties who brought forward those stale claims, to obtain some *dictum* or hint of an opinion that interest for more than thirty years should be paid, this court refused to take jurisdiction and pronounce any opinion on the subject.

* 18 Howard, 40. † Page 45.

Since that time it appears that the treasury has been thought to labor under the very unusual disease of a *plethora*, and the Attorney-General, unwilling to "follow in the footsteps of his predecessors," has discovered a mode of relief for its *depletion* by allowing forty years' interest to these claimants as a reward for their *laches* in not pursuing them in proper time.

As respects the effect of the repealing statute of March 2, 1861, the whole argument urged on behalf of the appellants is founded on a false assumption. It is asserted that this is a case of arbitrament and award, and was binding as such on the government, and that the repeal of the resolution of Congress could not affect or invalidate rights vested by the award previously made under it. But the Secretary of War was not an *arbitrator*. An arbitrator is defined* as "a private extraordinary judge *chosen by* the *parties who have a matter* in dispute, invested with power to decide the same." The Secretary of War acted *ministerially*. The resolution conferred no judicial power upon him.† In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy. The resolution under which the secretary assumed to act did not authorize him to make a final adjustment of the matter embraced in it. It did not bind the appellant to an acceptance of the amount reported by the secretary, or that he would cease to clamor for *more*, after being a *fifth* time paid the amount of damages awarded to and *accepted by him*.

The joint resolution of June 1st, 1860, was the *fourth* resolution which had been passed for the adjustment of the claim of the legal representatives of George Fisher against the United States, for injuries done to his property by the United States troops in 1813. In pursuance of the first three of these resolutions, *five* different allowances were made in favor of, and paid to the appellant, amounting in all to *sixty-*

* Bouvier's Law Dictionary, title "Arbitrator."

† De Groot v. United States, 5 Wallace, 432.

six thousand eight hundred and three dollars and thirty-three cents. If the finding of the Secretary of War, under the joint resolution of June 1st, 1860, was final and conclusive, so also must have been the finding and allowance of the second auditor of the treasury, under the joint resolution of April 12th, 1848. Yet the appellant insisted that he was not concluded by the finding of the second auditor. He claimed and received after this allowance *four* additional allowances.

An arbitrament and award which concludes one party only is certainly an anomaly in the law. The various acts and resolutions of Congress in this case emanated from a desire to do justice, and to obtain the proper information as a basis of action, and were not intended to be submissions to the arbitrament of the accounting officer. They were designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject, or rescind, or to otherwise act in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial, not a judicial capacity.

The joint resolution of June 1st, 1860, gave the appellant a tribunal, before which his claims might be investigated. The repeal of that resolution only deprived him of *that* tribunal. It was competent for Congress to abolish the tribunal it created for the adjustment of the appellant's claims, or it might have committed them to some other authority. In either event the claimant's right would not have been violated, only his *remedy* for the enforcement of those rights would have been taken away or changed. The power that created this tribunal might rightfully destroy it, unless some *rights* had accrued which were the result of the creation of such tribunal, and inseparable from it. Here no such rights had resulted from the passage of this resolution. The appellant was left where that resolution found him. His right to importune Congress for *more* was not at all impaired by its repeal.

JUDGMENT AFFIRMED.

THE GRACE GIRDLER.

1. Although the rules of navigation require that a vessel coming up behind another, and on the same course with her, shall keep out of the way, yet the rule presupposes that the other vessel keeps her course, and it is not to be applied irrespective of the circumstances which may render a departure from it necessary to avoid immediate danger.
2. Where, in case of collision, with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on which it has fallen.
3. This court will not readily reverse in a case of collision, depending on a mere difference of opinion as to the weight and effect of conflicting testimony, where both the District and Circuit Courts have agreed. It affirmed, accordingly, a decree in such a case.

APPEAL from the Circuit Court for the Southern District of New York, in a case of collision, the question being one largely of fact; and the case being submitted.

Messrs. Carlisle and C. N. Black, for the appellants; Mr. O'Donohue, contra.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

This is a case of collision. It occurred on the East River, in the afternoon of the 5th of August, 1863, between the yacht Ariel and the schooner Grace Girdler. Both vessels were beating down the river to the bay. The yacht had made her long tack, and had gone about near the New York shore, and was standing upon her short tack across the river. The schooner had done the same things, and was standing in the same direction. In going about she had passed to the windward of the yacht, and held that position in her short tack. The yacht was to the leeward, and a very little way in advance. As she was beginning to make headway, the approach of a steam ferry-boat coming up the river compelled her suddenly to luff three or four points in order to get out of the way. This threw her unexpectedly in the way of the schooner, and was the proximate cause of the collision.

The vessels came together, and the yacht was sunk and lost. The locality of the collision was opposite to the foot of Stanton or Grand Street, in the city of New York, and about one-third of the way across the river.

So far both sides agree as to the facts, but no further. Here begins the stress of the case, and the antagonisms in the testimony of the parties gather around it.

The libellants allege that the schooner was wholly in fault. They say that she ought not to have been so near the yacht; that she ought to have seen the danger to the yacht from the approach of the ferry-boat, and seeing it, ought immediately to have luffed, to get more to the windward; and that if she had done so, the accident would not have occurred. They insist that the schooner, being so nearly in the track of the yacht, and in such close proximity, it was her duty to exercise the greatest vigilance, and to omit no precaution against danger.

The respondents insist that there was no fault on the part of the schooner; that when the yacht suddenly came into her path to avoid the ferry-boat, the schooner, if not in stays, had so little headway on that she was powerless to change her course, or to do anything else to prevent the two vessels from coming in contact. In behalf of the schooner there is testimony to the effect that the yacht, having escaped the ferry-boat by luffing, should have luffed still more to avoid the schooner, and that if she had performed this simple and obvious duty, the collision could not have occurred.

The schooner was thoroughly manned. The captain was an experienced seaman. A regular Hurlgate pilot was at the helm.

A pleasure-party was on board the yacht. Lockwood, the captain, was the superintendent of an oil warehouse. He had served as a seaman during a voyage to California in 1849. He had no other nautical experience. Slavin was the sailing-master. He was twenty-two years of age, and had some experience as a sailor. He "had been, off and on, five or six years, sailing-master of those small vessels about New York," and "had been on the Ariel six or seven weeks at that time."

Before he went upon the yacht he had been at work for Lockwood in an oil factory. Lockwood, in his deposition, says, "All on board were gents but Slavin and an extra hand." The testimony of the extra hand has not been taken, and it is not shown who he was, what were his qualifications, or in what capacity he served. It does not appear that any one was charged with the duty of a look-out. Lockwood, the captain, was at the helm. He says:

"The schooner made a longer tack than I, and followed on nearly in our track—a little to the southward. Before I got across the steam ferry-boat Cayuga crossed track on my bow. I luffed a little up to avoid a collision with her, and as I was filling away again, the Grace Girdler came up behind and struck me astern. Her jib-boom went into my mainsail. We had got about first, and she was about one hundred feet behind us when she got about. I did not pay any particular attention to her, as I was watching the ferry-boat. When I got clear of the latter, then I saw the Grace Girdler coming down upon us. Mr. Slavin, the sailing-master, hailed her three times, but received no answer. She was not further than this room from us when I saw she was coming down on to us. When I saw she was coming I put my helm hard up, expecting she would go off to the windward of me. I also let go my main sheet, to let my vessel run off before the wind; but she hit me before she (the yacht) run off. . . . She could have cleared me by coming up into the wind. . . . The ferry-boat was from fifty to seventy-five feet from me. She was bound to Williamsburg, and crossed my bow, and I came within fifteen or twenty feet of hitting her, notwithstanding I luffed. . . . *I did not suppose it necessary to act* to avoid the ferry-boat till she got near us. I luffed *three or four points*, and continued that long enough to let her run by."

From this testimony it appears that no very great vigilance was exercised on the yacht to supply the place of a look-out, and that the judgment formed by the captain as to the danger involved in the approach of the steamer was by no means accurate.

The chief fault attributed to the schooner is, that she did not luff into the wind and avoid the yacht by passing to the

windward. It is not denied that the schooner was to the windward after running out her long tack and coming about, nor that she would have avoided the yacht if the yacht had not thrown herself in the way of the schooner to avoid the ferry-boat.

Horton, the pilot of the schooner, had been a Hurlgate pilot for sixteen years. He says:

"After we went about, we drawed away our jibs, let up anything forward; saw the yacht to the leeward, about fifty yards on our lee quarter, dead to the lee quarter. She kept hauling up and nearing us all the while, and we was motionless at the time, and I told them on the yacht to slack the main sheet, but they paid no attention to me, and came right up to our lee bow in contact with our jib-boom, which hooked his mainsail. We had not got under headway at the time of the collision. Our jibs had not filled. We could not have done anything in our condition to avoid it. The helm was to the leeward, in the lee-becket dover. When we got around so that the jibs took, I put my helm down."

This testimony, if credible, vindicates the schooner and fastens the blame upon the yacht. Perhaps the reason why the warning of the pilot was not heeded was, that the officers of the yacht had not recovered from the perturbation produced by their narrow escape from the ferry-boat, and that there was no look-out to give notice of the dangerous proximity of the schooner, induced by the new position which the yacht had been compelled to assume. The statement of the pilot is fully sustained by the captain and several of the crew of the schooner who were examined. They all aver that she had so little headway that nothing could be done on her part to avert the collision.

The sailing-master and gentlemen on the yacht sustain more or less fully the facts stated by Captain Lockwood. As usual, those on board on each side acquit their own and condemn the other vessel. The statement of Lockwood is also sustained by McQueen, the pilot of the Cayuga, and by Goodby, the pilot of the Peck Slip ferry-boats. They saw

the collision—inculpate the schooner and exculpate the yacht.

On the other hand, Captain Barber, of the schooner Jenny Lind, who was near at hand and saw everything that occurred, exonerates the schooner and casts the entire responsibility upon the yacht. Such also is the effect of the testimony of Gilbert, a pilot on the Hunter's Point line of boats. He too was a spectator. Captain Barber says:

"I have followed the water eighteen years, and now am master of a vessel. Know the Grace Girdler. I live in Westerly. My vessel belongs to Stonington. I was on the schooner Jenny Lind the day of the collision. We went about somewhere near the coal-yard of the Penn Coal Company at Williamsburg. After we went about we were in the wake of the yacht and the Grace Girdler. All three of us were standing toward New York side. As I was walking back and forth on my deck, I saw the yacht a little ahead of the Grace Girdler. As the latter came up with the yacht she kept off a little to go under her lee to clear her quarter. The yacht was a little ahead and tacked first, and the Grace Girdler rounded her and came up to the windward. The yacht made headway. The schooner payed off some, and her jib was shaking all the time until they went clear. I don't see as the Grace Girdler could do anything to prevent this collision, as her head sails were shaking and her gaff topsails and mainsail full. The schooner's fore sheets were all slacked up and she payed off and hooked into the yacht. The schooner had no command of herself. The yacht was not ahead at all after I saw them. I did not see the yacht sink. Saw the schooner sag off on to her. The yacht ought to have gone around the schooner's stern or started a sheet and gone off on the other hand."

No one had a better opportunity of seeing and understanding all that occurred than this witness, and there is none whose testimony we deem entitled to more weight. There is no impeaching testimony. The witnesses upon each vessel must have known the condition of things and what occurred there. Unless we impute perjury, which we see no reason to do, they are entitled to credence as to this class of facts. As to what occurred upon the other vessel they are

liable to be mistaken, and their testimony is entitled to less weight than the testimony of witnesses who were present.

In respect to the yacht, we pass by the inquiries whether she was properly manned, whether she had a sufficient look-out, and whether by due vigilance and good seamanship she might not at her leisure have given the ferry-boat a safe berth, and thus have avoided the necessity of placing herself, as it were by a leap, across the bows of the schooner. These points have not been pressed upon our attention by the learned counsel for the appellants, and in the view which we take of the case their solution is not necessary to its proper determination. The testimony of those on board of the yacht proves clearly that all was done in the emergency that was practicable and proper. If there was any omission, under the circumstances it was an error and not a fault. In the eye of the law the former does not rise to the grade of the latter, and is always venial.* For the purposes of this case we hold that the yacht was blameless. But she suddenly thrust herself before the schooner, and took the latter by surprise. If the testimony of the pilot, captain, and crew of the schooner be true, it is indisputable, as is insisted by the appellants, that she had then so little headway as to be impotent to do anything to prevent the impending catastrophe. Her helm was kept where it should have been to have the greatest effect in turning her head more to the windward. Her jib might have been lowered, to give greater effect to the wind upon the sails in the after-part of the vessel; but if, as the proof is, it was shaking at the time, this could have had no effect, and would have been useless. This testimony shows that the schooner, as to this part of the case, was also free from fault. The superadded testimony of Barber and Gilbert leave no room for doubt in our minds upon the subject. The loss of the yacht was not produced by a blow from the schooner, but by the jib-boom of the schooner running through her mainsail, and turning her so far upon her

* Reeves *v.* The Constitution, Gilpin, 587; N. Y. L. & S. Co. *v.* Rumball, 21 Howard, 383; Propeller Genesee Chief *v.* Fitzhugh et al., 12 Id. 461.

side that she filled with water. As soon as her jib-stay was cut loose from the anchor of the schooner, she sunk.

But it is insisted that the schooner is blamable for not having provided in advance for the contingencies of the approach of the ferry-boat to the yacht, and the sudden transit of the latter to the windward. To this there are two answers.

First. The schooner came about near the New York shore, under the stern of the yacht, and was passing to the windward of her. Lockwood expected the schooner to pass on that side. The witnesses on both sides agree that she was there when the yacht luffed and changed her course three or four points in the same direction to escape the ferry-boat. It is not denied by any one that but for this there would have been ample room between them for both to pass in safety. There is no proof that it was in the power of the schooner to put herself any further to the windward than she was. We suppose it will not be insisted that the schooner was bound to stop before running out her long tack, or to make it longer.

Secondly. The case made against the schooner is contained in the fourth article of the libel. The charges set forth are confined to omissions at the time of the collision or immediately preceding it. Neither in the pleadings nor proofs is fault charged at any other time. It is nowhere charged or proved that it was the duty of the schooner to have foreseen the contingencies which caused the collision, or to have made any provision against them. The record before us is a blank as to that subject.

It is not intended to impugn anything said by this court in the case of *Whitridge et al.* v. *Dill et al.** as to the rules which should govern a vessel behind another and pursuing the same course. This case is plainly distinguishable from it in several particulars. It is sufficient to mention one of them. In that case there was no sudden change by the leading vessel to a course across the bows of the one behind her. That is the controlling fact in the case under consideration.

* 23 Howard, 448.

The appellants have invoked the aid of the act of Congress of April 29, 1864, "fixing rules and regulations for preventing collisions on the water." The 17th article does, as suggested, provide "that every vessel overtaking another vessel shall keep out of the way of the said last-mentioned vessel." But the 18th article provides, subject to certain qualifications, that the other vessel shall keep her course; while the 19th and 20th provide that due regard shall be had to the circumstances which may render a departure from the rules prescribed necessary in order to avoid immediate danger, and that nothing in the act shall warrant the neglect of any proper precaution, or excuse the fault of bad seamanship, under any circumstances that may occur.

It would be a strange result if the statute should make an innocent vessel liable for an inevitable accident.

In order to recover full indemnity it is necessary that the suffering vessel should be without fault. Generally the burden of proof rests upon the libellants. Where fault is shown on the part of the damaging vessel, it is incumbent on her to show that such fault had in no degree the relation of cause and effect to the accident.*

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property.† Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.‡

The case of *The Thornley*,§ though unlike this case in its facts, has one point of resemblance which renders it worthy of attention. That vessel, while "forging" her way through

* Waring v. Clarke, 5 Howard, 441.

† The Europa, 14 Jurist, 629; The Virgil, 2 W. Robinson, 205; The Lochlibo, 3 Id. 318; The W. V. Moses, 6 Mitchell's Maritime Register, 1553.

‡ The Catherine of Dover, 2 Haggard, 154. § 7 Jurist, 659.

the Nore Sands, was hailed by the Mentor, a vessel at anchor near them, to come to anchor. She could not then do so without danger of destruction. Very soon after she passed the Sands a collision occurred. She alleged that it was an inevitable accident. It was objected (1) that she should have anchored instead of passing the Sands, and (2) that she should have anchored as soon as she passed them. The Trinity Masters said: "We consider the collision accidental. She could not let go her anchor until clear of the Sands; if in this case she had let go her anchor, immediately on being clear, the collision would still have occurred." Dr. Lushington took that view of the case, and pronounced against the claim of the libellants. His judgment proceeded upon the ground that the Thornley was *powerless to prevent the accident.* The point that she should have anchored before attempting to pass the Sands was not noticed.

There is another feature of the case before us, to which it is proper to refer. The District Court acquitted the schooner and dismissed the libel. The libellants appealed to the Circuit Court. That court affirmed the decree. The case is now here by a second appeal. This court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal it must be clear that the lower courts have committed an error, and that a wrong has been done to the appellants.* This is not a case of that character. If it were now before us for decision the first time, although our minds are not entirely free from doubt, we could not come to any other conclusion than the one we have announced.

DECREE AFFIRMED.

Mr. Justice DAVIS (with whom concurred the CHIEF JUSTICE and Mr. Justice CLIFFORD), dissenting:

I dissent from the opinion in this case. I think the rules

* Walsh *v.* Rogers, 13 Howard, 284; The Marcellus, 1 Black, 414; Ib., The Water Witch, 494; The Grafton, 1 Blatchford, 173; Ib., The Narragansett, 211; Cushman *v.* Ryan, 1 Story, 95; Ib., Bearse *v.* Pigs, &c., 322; Tracey *v.* Sacket, 1 Ohio State, 54.

of navigation require that a vessel coming up behind on the same course as the vessel before her, is bound to keep out of the way, and I cannot agree that the collision was the result of inevitable accident, as it occurred in the daytime, on smooth water, and in fair weather.

BROWN v. PIERCE.

1. Where a bill, alleging a good title to lands in a complainant, and setting forth, particularly, the nature of it, sought to have a conveyance made by duress annulled, and the land reconveyed free from the lien of judgments obtained against the grantee after the conveyance, an answer by the judgment creditor, setting up in general terms a good title in the grantee, on the representation and faith of which he had lent such grantee money, must be taken as referring to the title derived under the deed in controversy. And this though there have been no replication to the answer.
2. Where, in such a bill, the complainant, by way of affecting the judgment creditor with notice, sets forth that he, the complainant, was never out of possession of the land, an answer, averring in general terms that the respondent was informed and believed that the complainant entered as tenant of the grantee, but not specifying any time or circumstances of such entry, nor assigning any reason for not specifying them, is insufficient and evasive; there being nothing alleged which tended to show that the grantee ever pretended to have any other title than that derived from the complainant, or that there was any title elsewhere.
3. A deed procured through fear of loss of life, produced by threats of the grantee, may be avoided for duress.
4. A judgment being but a general lien, and the creditor under it obtaining no incumbrance but on such estate as his debtor really had, the equity of such creditor gives way before the superior right of an owner in the land who had conveyed the land to the debtor only by duress, and who had never parted with possession.

ERROR to the Supreme Court of Nebraska Territory.

Brown filed his bill in September, 1860, in the court below against three persons, Pierce, Morton, and Weston, alleging that in the spring of 1857, he settled upon and improved a tract of land near Omaha; that he erected a house on the tract and continued to occupy it until August 10th, 1857, when he entered the tract under the pre-emption laws of the

United States; that Pierce claimed the land by virtue of the laws of an organization known as the Omaha Claim Club; that this organization, consisting of very numerous armed men, sought to, and did to a great extent, control the disposition of the public lands in the vicinity of Omaha in 1857, in defiance of the laws of the United States; that it frequently resorted to personal violence in enforcing its decrees; that the fact was notorious in Omaha, and that he, Brown, was fully advised in the premises; that as soon as he had acquired title to the land, Pierce, together with several other members of the club, came to his house and demanded of him a deed of the land, threatening to take his life by hanging him, or putting him in the Missouri River, if he did not comply with the demand; that the club had posted handbills calling the members together to take action against him; and that knowing all this, and in great fear of his life, he did, on the 10th of August, 1857, convey the land by deed to Pierce; that he, Brown, received no consideration whatever, for the conveyance; that *from the date of his settlement upon said land, until the time of filing the bill, he had continued to keep possession either actually or constructively;* that Morton claimed an interest in the premises by virtue of a judgment lien, and that Weston also made some claim.

The prayer was, that the deed might be declared void, and Pierce be decreed to reconvey, and for general relief.

The bill was taken *pro confesso* as to all the defendants, except Morton, who answered.

This answer, stating that he, Morton, was not a resident of the Territory, and had no knowledge or information about the facts alleged in the bill, but on the contrary was an utter stranger to them, and therefore could not answer as to any belief concerning them,—set forth that on the 28th August, 1857, Pierce was "the owner and in possession of, and otherwise well seized and entitled to, as of a good and indefeasible estate of inheritance in fee simple," the tract in controversy; that being so, and representing himself to be so, and having need of money in business, he applied to him, Morton, to borrow the same, and that he, Morton, being

Argument in support of the deed.

induced by reason of the representation, and also by the possession, and believing that he, Pierce, was the owner, he was thereby induced to lend, and did lend to him $6000, on the personal security of him, Pierce; that before the filing of this bill by Brown, he, Morton, had obtained judgment against Pierce for $3400, part of the loan yet unpaid; that this judgment was a lien on the lands; and that as he, Morton, was informed and believed, if he could not obtain his money from this land, he would be wholly defrauded out of it.

The answer further stated that the defendant was informed and believed that Brown, the complainant, entered upon the lands as the tenant of Pierce, and that the suit by the complainant was being prosecuted in violation of the just rights of Pierce, as well as of him, Morton.

There was no replication. Proofs were taken by the complainant, and they showed to the entire satisfaction of the court that all the matters alleged in the bill and not denied by the answers, were true.* There thus seemed no doubt as to the truth of all the facts set out in the bill.

The court below declared Brown's deed void, and decreed a reconveyance from Pierce to him, and that neither Morton nor Weston had any lien on the premises. Morton now brought the case here for review.

Messrs. Carlisle and Woolworth, for the appellant, Morton.

1. No replication having been filed, the cause, as between Brown and Morton, was heard on bill and answer, and it comes here for hearing in the same way. The answer is in such a case to be taken as true. The bill does not state a title in the complainant otherwise than vaguely. The answer avers a good title in Pierce when Morton lent his money.

2. No sufficient case of duress is presented. The club may have been called together, but there is no evidence that they ever came together or would have come together. Conced-

* See *infra*, p. 218.

ing, for argument's sake only, that the deed was given under what the law deems duress, still the answer shows a valid lien, perfected by judgment. All the proceedings were had before this bill was filed, and in entire ignorance, on Morton's part, of Brown's claims. Morton is in the same position as a *bonâ fide* purchaser, without notice, would be.*

3. Upon its own circumstances, Morton's lien is entitled to protection against Brown's equities. The deed was made August 10th, 1857. The first word of complaint was uttered when the bill was filed, which was September 7th, 1860, three years afterwards. During this period Morton lent his money to Pierce, upon the credit which this land gave him, sued out and levied his attachment, prosecuted his suit, and recovered his judgment; and during all this time, and during all these proceedings, he was kept in entire ignorance of Brown's claims. No reason is shown for this silence and delay. The deed, never more than voidable, must be deemed affirmed by this silence.†

Messrs. Redick and Briggs, contra:

1. The title alleged by the answer to have been in Pierce, must, on the facts and the loose allegations of the answer, be assumed to be the one derived from the deed sought to be set aside.

2. Sufficient duress is shown. Brown was under no obligation to wait, before he made the deed, until he had been actually thrown into the river and had come up for the last time; or, if hanging had been the mode of punishment adopted, should he have waited until the rope began to draw about his neck. He did as any prudent man of ordinary courage would have done under the circumstances.

3. The fact that the legal title was standing in Pierce's name at the time of the judgment is unimportant. The general lien of a judgment creditor upon the lands of his debtor,

* Carter v. Champion, 8 Connecticut, 549; Kent v. Plummer, 7 Maine, 464; Porter v. Bank of Rutland, 19 Vermont, 410; Jones v. Jones, 16 Illinois, 118; Martin v. Dryden, 1 Gilman, 188.

† Doolittle v. McCullough, 7 Ohio State, 299, 307.

is subject to all equities which existed against the lands in favor of third persons, at the time of the recovery of the judgment.* Morton claims only as a judgment creditor, and his lien, if any, is *general*, not *specific*. It is not proved that he cannot make the amount of his judgment out of other property of the debtor, as it is not shown that execution has been issued and returned unsatisfied. It was his duty to first exhaust his legal remedies.

Morton lent his money to Pierce in August, 1857, about the time the deed was by Pierce coerced from Brown, and the case shows that Brown was then in the actual possession of the land and has been ever since. Morton stands charged with notice.

Reply: As to the notice. The answer (which, as we have said, being without replication, is to be taken as true), says that Brown entered as Pierce's tenant, and was prosecuting the suit in fraud of his rights. The relation was one then of landlord and tenant.

Mr. Justice CLIFFORD delivered the opinion of the court.

Representations of the complainant were, that on the tenth of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the pre-emption laws of the United States, and that thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first-named respondent was at that time a member of an unlawful association in that Territory, called the Omaha Claim Club, and that he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of pre-emption to the land in question,

* Buchan v. Sumner, 2 Barbour's Ch. 165; Ells v. Tousley, 1 Paige, 280; White v. Carpenter, 2 Id. 217; Keirsted v. Avery, 4 Id. 9.

and told the complainant that if he entered the land under his pre-emption claim, he must agree to deed the same to him, and added, that unless he did so, he, the said respondent and his associates, would take his life; and the complainant further alleged, that the same respondent, accompanied, as before, by certain other members of that association, came again to his house on the day he perfected his pre-emption claim, and repeated those threats of personal violence, and did other acts to intimidate him, and induce him to believe that they would carry out their threats if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation, and through fear of his life, and without any consideration; and he prayed the court that the conveyance might be decreed to be inoperative and void, and that the grantee might be required to reconvey the same to the complainant.

Two other persons were made respondents, as claiming some interest in the land in controversy. Pierce, the principal respondent, and Weston, one of the other respondents, were non-residents, and were served by publication pursuant to the rules of the court and the law of the jurisdiction. They never appeared, and failing to plead, answer, or demur, and due proof of publication in the manner prescribed by law having been filed in court, a decree was rendered as to them, that the bill of complaint be taken as confessed.*

Morton, the other respondent, appeared and filed an answer, in which he alleged that the principal respondent, on the twenty-eighth of August, 1857, and for a long time before, was the owner in fee of the premises; that he was informed, and believed, that the complainant entered upon the land as the tenant of the principal respondent, and that he was prosecuting this suit in violation of the just rights

* Nations et al. v. Johnson et al., 24 Howard, 201.

of all the respondents; that the principal respondent wanting to borrow money, he, the respondent before the court, loaned him a large sum, and accepted bills of exchange for the payment of the same, drawn to the order of the borrower of the money, and which were indorsed by the drawer; that the bills of exchange not having been paid when they became due, he brought suit against the drawer and indorser, and recovered judgment against him for three thousand one hundred dollars; that the judgment so recovered is in full force and unsatisfied, and that the same is a lien on the premises described in the bill of complaint.

No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired a complete title to the land under the pre-emption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information or belief upon the subject.

Authorities are not wanting to the effect, that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids, are admitted; but the better opinion is the other way, as the sixty-first rule adopted by this court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed and taken to be sufficient.*

Material allegations in the bill of complaint ought to be answered and admitted, or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the re-

* Young v. Grundy, 6 Cranch, 51; Brooks v. Byam, 1 Story, 297.

spondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact.*

Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defence, and the well-known omissions and defects of such an answer may have some tendency to prove the allegations of the bill of complaint, but they are not such an admission of the same as will constitute a sufficient foundation for a decree upon the merits.†

Proper remedy for a complainant, in such a case, is to except to the answer for insufficiency within the period prescribed by the sixty-first rule; but if he does not avail himself of that right, the answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed.‡

Attention is called to the fact, that no replication was filed to the answer; but the suggestion comes too late, as the respondent proceeded to final hearing in the court below without interposing any such objection.

Mere formal defects in the proceedings, not objected to in the court of original jurisdiction, cannot be assigned in an appellate tribunal as error to reverse either a judgment at law or decree in equity.

Legal effect of a replication is, that it puts in issue all the matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged.§

Undenied as the answer is by any replication, it must

* Warfield v. Gambrill, 1 Gill & Johnson, 503.

† Young v. Grundy, 6 Cranch, 51; Parkman v. Welch, 19 Pickering, 234.

‡ Hardeman v. Harris, 7 Howard, 726; Stockton v. Ford, 11 Howard, 232; 1 Daniels's Chancery Practice, 736; Langdon v. Goddard, 3 Story, 13.

§ 1 Barbour's Chancery Practice, 249; Mills v. Pitman, 1 Paige's Chancery, 490; Peirce v. West, 1 Peters's Circuit Court, 351; Story's Equity Pleading, 878; Cooper's do., 329.

have its fair scope as an admission; but the court is not authorized to supply anything not expressed in it, beyond what is reasonably implied from the language employed. Proofs were taken by the complainant, and they show, to the entire satisfaction of the court, that all the matters alleged in the bill of complaint, and not denied in the answer, are true, and the conclusion of the court below was, that the complainant acquired a complete title to the land under his pre-emption claim, and that the deed from him to the principal respondent was procured in the manner and by the means alleged in the bill of complaint.

Nothing is exhibited in the record to support any different conclusion, or to warrant any different decree, unless it be found in one or the other of the first two defences set up in the answer.

First defence is, that the principal respondent, on the twenty-eighth of August, 1857, and long before that time, was the owner in fee of the premises; but neither that part of the answer, nor any other, denied that the complainant acquired a complete title to the land, as alleged in the bill of complaint, nor set up any defence in avoidance of those allegations, nor made any attempt to present any defence against the direct charge, that the deed under which the respondent claimed title was procured from the complainant through threats of personal violence and by means of duress. Indefinite as the allegation of title is, the answer must be construed as referring to the title under the deed in controversy, as it is not pretended that the respondent ever had any other, and, if viewed in that light, it is in no respect inconsistent with the conclusion adopted by the Supreme Court of the Territory.

Such an indefinite allegation cannot be considered as presenting any sufficient answer, either to the alleged title of the complainant or to the charge made in the bill of complaint.

Briefly stated, the second defence set up in the answer is, that the respondent was informed and believed that the com-

plainant entered upon the land as a tenant, but the time when the supposed entry was made is not alleged, nor are the circumstances attending the entry set forth, nor is any reason assigned why the allegations were not made more definite, nor is there any fact or circumstance alleged which shows or tends to show that there was any prior owner to the land, except the United States, nor that the respondent ever pretended to have any other title to the same than that derived from the complainant.

Viewed in any light, those allegations must be regarded as evasive and insufficient; and they are not helped by the omission of the complainant to file the general replication. Those parts of the answer being laid out of the case as insufficient to constitute a defence, the conclusion is inevitable that the title to the land was in the complainant as alleged, and that he parted with it through threats of personal violence and by duress, and without any consideration.

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.*

* Chitty on Contracts, 217; 2 Greenleaf on Evidence, 283.

Opinion of the court.

Text-writers usually divide the subject into two classes, namely, duress *per minas* and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts to the present time.*

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received.†

Second class, duress *per minas*, as defined at common law, is where the party enters into a contract (1) For fear of loss of life; (2) For fear of loss of limb; (3) For fear of mayhem; (4) For fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits.‡

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text-writers have adopted the rule, that it is only where the threats uttered excite fear of death, or of great bodily harm, or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person

* 2 Institutes, 482; 2 Rolle's Abridgment, 124.

† Richardson v. Duncan, 3 New Hampshire, 508; Watkins v. Baird, 6 Massachusetts, 511; Strong v. Grannis, 26 Barbour, 124.

‡ 8 Bacon's Abridgment, title "Duress," 252.

threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy.*

On the other hand, there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance.†

But the case under consideration presents no question for decision which requires the court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy.‡

Next question which arises in the case is, whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee.

Before proceeding to examine this question, it will be useful to advert briefly to the material facts exhibited in the record.

Title was acquired by the complainant under the preemption laws of the United States, and on the same day the principal respondent, through threats to take his life, if he refused, compelled him to convey the same to that respondent, and the record shows that the respondent before the

* Skeate v. Beale, 11 Adolphus & Ellis, 983; Atlee v. Backhouse, 3 Meeson & Welsby, 642; Smith v. Monteith, 13 Id. 438; Shepherd's Touchstone, 6; 1 Parsons on Contracts, 893.

† Foshay v. Ferguson, 5 Hill, 158; Central Bank v. Copeland, 18 Maryland, 317; Eadie v. Slimmon, 26 New York, 12; 1 Story's Equity Jurisprudence (9th ed.), 239; Harmony v. Bingham, 12 New York, 99; S. C., 1 Duer, 229; Fleetwood v. New York, 2 Sandford, 475; Tutt v. Ide, 3 Blatchford, 250; Astley v. Reynolds, 2 Strange, 915; Brown v. Peck, 2 Wisconsin, 277; Oates v. Hudson, 5 English Law and Equity, 469.

‡ 2 Greenleaf on Evidence, 283; 1 Blackstone's Commentaries, 131.

court, within the same month, loaned the money to the grantee in that deed, for which he recovered judgment, although the grantor was then in possession of the land, and has remained in possession of the same to the present time.

The judgment is founded upon the bills of exchange received for that loan. Judgments were not liens at common law, but several of the States had passed laws to that effect before the judicial system of the United States was organized, and the decisions of this court have established the doctrine that Congress, in adopting the processes of the States, also adopted the modes of process prevailing at that date in the courts of the several States, in respect to the lien of judgments within the limits of their respective jurisdictions.*

Different regulations, however, prevailed in different States, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or mesne process, created any preference in favor of the creditor until the execution was issued, and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself.†

Such judgments and decrees were made liens by the process acts in the Federal districts where they have that effect under the State laws, and Congress has since provided that they shall cease to have that operation in the same manner, and at the same periods, in the respective Federal districts, as like processes do when issued from the State courts. Federal judgments and decrees are liens, therefore, in all cases, and to the same extent, as similar judgments and decrees are, when rendered in the courts of the State.

Express decision of this court is, that the lien of a judg-

* Williams v. Benedict et al., 8 Howard, 111; Ward et al. v. Chamberlain et al., 2 Black, 438; Bayard v. Lombard, 9 Howard, 530; Riggs v. Johnson County, 6 Wallace, 166.

† Conard v. Atlantic Ins. Co., 1 Peters, 448; Massingill v. Downs, 7 Howard, 767.

ment constitutes no property in the land, that it is merely a general lien securing a preference over subsequently acquired interests in the property, but the settled rule in chancery is, that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof.

Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights.*

Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person.†

Guided by these considerations, the Court of Chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered.‡

Objection is also made, that the affidavit showing that the defendants were non-residents, was not in due form, and that the order of notice, and the publication of the same, were insufficient to give the court jurisdiction; but the proposition is not supported by the record, and must be overruled.

DECREE AFFIRMED.

* Drake on Attachments, § 223.

† Howe, petitioner, 1 Paige's Chancery, 128; Ells v. Tousley, Ib. 288; White v. Carpenter, 2 Paige, 219; Buchan v. Sumner, 2 Barbour's Chancery, 181; Lounsbury v. Purdy, 11 Barbour, 494; Keirsted v. Avery, 4 Paige's Chancery, 15.

‡ Averill v. Loucks, 6 Barbour, 27.

SILVER v. LADD.

1. In construing a benevolent statute of the government, made for the benefit of its own citizens, and inviting and encouraging them to settle on its distant public lands, the words "single *man*" and "married *man*," may, especially if aided by the context and other parts of the statute, be taken in a generic sense. *Held*, accordingly, that the fourth section of the act of Congress of 27th September, 1850, granting, by way of donation, lands in Oregon Territory to "*every* white *settler or occupant*, ... American half-breed Indians included," embraced within the term single *man*, an unmarried woman.
2. The fact that the labor of cultivating the land required by the act was not done by the manual labor of the settler is unimportant, if it was done by her servant, or friends, for her benefit and under her claim.
3. Residence in a house divided by a quarter-section line, enables the occupant to claim either quarter in which he may have made the necessary cultivation.
4. In cases where relief is sought on the ground that the patent was issued to one person while the right was in another, the decree should not annul or set aside the patent, but should provide for transferring the title to the person equitably entitled to it.

ERROR to the Supreme Court of Oregon.

An act of Congress of 27th September, 1850, providing for the survey and for making donations to settlers of public lands in Oregon,—commonly called the Donation Act,—provides by a part (here quoted *verbatim*) of its fourth section as follows:

"There shall be, and hereby is, granted to *every white settler or occupant* of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law of *his* intention to become a citizen, or who shall make such declaration on or before the first day of December, 1851, now residing in said Territory, or who shall become a resident on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or 320 acres of land, if a single *man*, and if a married *man* the quantity of one section, or 640 acres; one-half to *himself* and the other half to his

wife, to be held in her own right, and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office."

The fifth section of the same act is thus:

"That to all white MALE citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of 21 years, emigrating to and settling in said Territory, between 1 December, 1850, and 1 December, 1853, and to all white MALE *American* citizens not hereinbefore provided for, becoming 21 years of age in said Territory, and settling there between the times last aforesaid, who shall in other respects comply with the foregoing section and the provisions of this law, there shall be, and hereby is granted, the quantity of one-quarter section, or 160 acres of land, if a single *man*, or if married, or if he shall become married within one year from the time of arriving in said Territory, or within one year after becoming 21 years of age as aforesaid, then the quantity of one-half section, or 320 acres, one-half to the *husband* and the other half to the *wife*, in her own right, to be designated by the surveyor-general as aforesaid," &c.

With these provisions in force, Elizabeth Thomas, an aged widow, went with her son, an unmarried man, to Oregon Territory, and settled there. They lived in the same house. It stood upon the line dividing two parcels of land; the line running through the centre of the building. Cultivation was made on both tracts, one being claimed by the mother, the other by the son. On the 17th of May, 1861, the register and receiver of the proper land office issued a *donation certificate*, declaring Mrs. Thomas to have made the proof which entitled her to a patent for the tract which she claimed. The son received also a certificate for the adjoining tract, which he claimed. There was no dispute about that tract.

Mrs. Thomas had been a widow for more than twenty years when the settlement was made under which she received the certificate. The certificate granted to Mrs. Thomas was subsequently, June 25, 1862, set aside by the Commissioner

of the Land Office, on the ground that she was *not the head of a family*. On appeal to the Secretary of the Interior, the action of the commissioner was affirmed, on the ground that she was *not a settler on the land*. In January, 1865 (Mrs. Thomas being now dead, and the land in possession of one Silver, legal representative of her son, and only heir, Fenice Caruthers, who died soon after her), the United States sold the land and granted a patent for part of it to one Ladd, and for the residue to a certain Knott. These brought ejectment against Silver in the Circuit Court of the United States upon the patent. Silver thereupon filed a bill in one of the courts of Oregon against them, setting forth the title of Mrs. Thomas, of her son, and of himself, representing that the patents were clouds on the true title, and praying an injunction against the suit at law. The prayer asked further:

"That the said patents may each be declared to be fraudulent, and as being procured by misrepresentation and fraud, and in favor of the rights of plaintiff, and that they be, and each of them, declared *cancelled and set aside*, and declared fraudulent and *void*, and that the claims of said defendants, and each of them, be adjudged fraudulent and *void*, and without authority of law, and that the title of the said premises be adjudged to be in the estate of Fenice Caruthers, deceased, and that the same be quieted, and that the possession thereof be decreed to the plaintiff."

The court in which the bill was filed dismissed it; and on appeal to the Supreme Court of Oregon the decree was affirmed; that court holding that the donation certificate was void, because Mrs. Thomas, having been an unmarried *female*, was not such a person as could take lands under the Donation Act. The question here now was the correctness of the affirmance.

Mr. J. S. Smith, for the plaintiff in error:

The grounds taken by the Commissioner of the Land Office and by the Secretary of the Interior seem to be without force. We reply to the argument of the Supreme Court of Oregon.

The word man is to be read in a generic sense, and as meaning person. There is probably not an essay or work of any considerable length published in the English language, alluding to the human race, that does not employ the word constantly in this way. The words "he" and "man" are used also frequently in acts of Congress to denote both males and females, especially in many prohibitory and penal sections. So, the naturalization laws—like this act a voluntary concession of favors—use the words "he," "him," and "man," constantly to denote and include both men and women. The expression "single man," in this act, points to the quantity of land rather than the classification of persons.*

The qualifications mentioned in section 4 are repeated in section 5, with the addition of the word "male," and with a further limitation of persons, by leaving out "American half-breed Indians." The age limit is also changed from 18 to 21 years. It is difficult to avoid the conclusion that the difference in phraseology of the two sections was intentional, and the word "male" was inserted in section 5 and omitted in section 4 for a purpose. To make a word which in common use has both a generic and specific meaning, assume its specific meaning when such meaning is not favored by its position in the context, and is repugnant to the manner in which the legislature have employed other words, would make Congress guilty of discriminating in language without a difference in meaning, and is opposed to the general spirit of the act. Everywhere, through all its parts, the act shows a liberal design and disposition toward making provision for women.

If our view is right, the patent must be cancelled as void. An idea seems to obtain that there is some magic about a patent of the United States which precludes investigation of its validity. But from the beginning, our State courts have entertained a bill to avoid a patent in favor of previously acquired rights, upon precisely the same principles that it would lie to avoid the deed of a private individual,

* Mick v. Mick, 10 Wendell, 379; Sutliff v. Forgey, 1 Cowan, 97.

and the United States Supreme Court has taken the same course without exception. The only debatable ground has been to what extent and upon what grounds a patent can be attacked in a court of law.

Messrs. Ashton, Coffey, and Lander, contra:

1. If the word "man," as used in section 4, is a generic term, and includes woman as well as man, then it must be a generic term when qualified in the same sentence by the adjective *single*, as well as when qualified by the adjective *married*. It cannot have two meanings in the same act, the same section, the same sentence. If by the word man, man alone is meant, the section and sentence have force and meaning; if both are included, the meaning of the clause is destroyed. It would read thus:

"There shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, &c. If a single man (or woman), and if a married man, (or woman), or if he (or she) shall become married within one year from the 1st of December, 1850, the quantity of one section, or six hundred and forty acres, one half to himself (or *herself*) and the other half to his *wife*, to be held by her in her own right."

This reading is absurd on its face.

2. The state of the Territory of Oregon at the time this law was passed, and the condition of its laws with reference to land, forbid the construction set up by the appellant. Oregon, by treaty, was open to the joint occupation of the subjects of Great Britain and the United States. Under the treaties, citizens of the United States, as is well known, had braved the dangers and endured the privations of an overland journey across the continent, and settled among tribes of Indians which were both hostile and treacherous. Without government or protection, they created a provisional government, and enacted a land law suitable to their wants, and proper to the condition of the country, where a man had to defend as well as to labor upon the land which he claimed

and allotted to himself. Under such circumstances, the words "any person," in the provisional land law, could hardly be intended to include a single woman. This court, in *Stark* v. *Starrs*,* goes far to sustain the doctrine that Congress had this land law in view when they passed the act of 27th of September, 1850. The construction put upon the act by the Supreme Court of Oregon, whose judgment it is now sought to reverse, is, in effect, an interpretation of a State law by the courts of the State itself.

3. Confessedly Mrs. Thomas was an old woman when she went to Oregon, how old don't clearly appear, but certainly aged. She could not have made the cultivation required. In fact she lived in her son's house; he made the settlement, if any was made, but confessedly *it* was not on this tract. He, not she, was the head of a family. The objections of the commissioner and secretary are, therefore, not without force, though less conclusive than those of the Supreme Court of Oregon.

Mr. Justice MILLER delivered the opinion of the court.

The donation certificate granted to Elizabeth Thomas was set aside by the Commissioner of the Land Office, June 25, 1862, on the ground that Elizabeth Thomas was not the head of a family. On appeal to the Secretary of the Interior, the action of the commissioner was affirmed, on the ground that she was not a settler on the land. The Supreme Court of Oregon, whose judgment we are now to review, held the certificate void, because she was not such a person as could take lands under the act, being an unmarried female.

If, for any of these reasons, the action of the commissioner can be sustained, then the judgment of the Supreme Court of Oregon dismissing plaintiff's bill must be affirmed. If it cannot, then the patents issued to defendants after the certificate of Elizabeth Thomas was wrongfully set aside, must enure to the benefit of plaintiff, representing her equitable title.†

* 6 Wallace, 415.

† Lindsey v. Hawes, 2 Black, 554; Garland v. Wynn, 20 Howard, 8; Minnesota v. Bachelder, 1 Wallace, 109.

It is upon the application of the facts of this case to part of section four of the act of 1850, that the questions of construction already mentioned arise.

As there is nothing in this act which requires the settler to be the head of a family, that question may be dismissed without further consideration.

In reference to the question of actual settlement and residence on the land, we have only to refer to the case of *Lindsey* v. *Hawes*,* where this precise question is raised, and where it is said that a person residing in a house which is bisected by the line dividing two quarter sections, will be held to reside on both, and, consequently, on either of them, to which he may assert a claim. Nor is any importance to be attached to the fact that Mrs. Thomas was old and incapable of the manual labor necessary to cultivating ground. If it was done for her by hired servants, or by her son without compensation, it is equally available to her. In reference to this question and to the one next to be considered—namely, the right of unmarried women to the benefits of this statute—we may apply, with added force, the language used in *Lindsey* v. *Hawes*, that it concerns a construction of one of the most benevolent statutes of the government, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. In addition to this it may be said that the section of this statute which we are now considering was passed for the purpose of rewarding in a liberal manner a meritorious class of persons, who had taken possession of that country and held it for the United States, under circumstances of great danger and discouragement. These circumstances and the policy of this act are fully stated in the case of *Stark* v. *Starrs*,† decided at our last term.

Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the Territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled

* 2 Black, 554.

† 6 Wallace, 402.

to its benefits, is at variance with the manifest purpose of Congress.

With these views we approach the last and most difficult question in the case, namely, whether Mrs. Thomas is excluded from the benefit of this act because she was an unmarried woman.

The affirmation of this proposition is based upon that clause of the fourth section, which, in prescribing the quantity of land to be given to each actual settler, says it shall be "one-half section, or three hundred and twenty acres, if a single man, and if a married man," six hundred and forty acres. We admit the philological criticism that the words "single man" and "married man," referring to the conjugal relation of the sexes, do not ordinarily include females. And no doubt it is on this critical use of the words that the decision of the Oregon court is mainly founded.

But, conceding to it all the force it may justly claim, we are of opinion that it does not give the true meaning of the act, according to the intent of its framers, for the following reasons:

1. The language of the statute is, that there is hereby granted to "every white settler or occupant of the public lands, above the age of eighteen years," &c. This is intended to be the description of the class of persons who may take, and if not otherwise restricted, will clearly include all women of that age as well as men.

2. It is only in prescribing the quantity of land to be taken, that the restrictive words are used, and even then the words used are capable of being construed generically, so as to include both sexes. In the case of a married man it is clear that it does include his wife.

3. The evident intention to give to women as well as men, is shown by the provision, that, of the six hundred and forty acres granted to married men, one-half shall go to their wives, and be set apart to them by the surveyor-general, and shall be held in their own right. Can there be any reason why a married woman, who has the care and protec-

tion of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?

4. But a comparison of the manifest purpose of Congress and the language used by it, in section four of this statute, with those of section five, will afford grounds for rejecting the interpretation claimed by defendants, which are almost conclusive.

The first of these sections applies, as we have already said, to that meritorious class who were then residing in the Territory, or should become residents by the first of December thereafter. It extends to persons not citizens of the United States, to persons only eighteen years old, and it gives to each a half-section of land. The fifth section makes a donation of half this amount, and is restricted to citizens of the United States, or those who have declared their intention to become citizens, and to persons over twenty-one years of age. But what is most expressive in regard to the matter under discussion is, that the very first line of that section, in which the class of donees is described, uses the words "white *male* citizens of the United States."

Now, when we reflect on the class of persons intended to be rewarded in the fourth section, and see that words were used which included half-breeds, foreigners, infants over eighteen, and which provided expressly for both sexes when married, and used words capable of that construction in cases of unmarried persons, and observe that in the next section, where they intend to be more restrictive, in reference to quantity of land, to age of donee, citizenship, &c., they use apt words to express this restriction, and then use the word "white males" in reference to sex, we are forced to the conclusion that they did not intend, in section four, the same limitation in regard to sex, which they so clearly expressed in section five. The contrast in the language used in regard to the sex of the donees in the two sections, is sustained throughout by the other contrasts in

age and character of the donees, and in quantity of land granted.

The certificate of Mrs. Thomas was, therefore, properly issued by the register and receiver, and conferred upon her the equitable right to the land in controversy, and the decree of the Supreme Court of Oregon must be reversed.

But the language of the prayer of this bill for relief, and some remarks in the brief of counsel, call for comment on the proper decree to be rendered on the return of the case to that court.

The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, enured in equity to the benefit of plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways.* The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose. In some of the States it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree, and additional relief may be granted by giving possession of the land to plaintiff, quieting his title as against defendants, and enjoining them from asserting theirs.

The prayer for general relief in the bill in this case is sufficient to justify any or all these modes of relief, and the case is REMANDED TO THE SUPREME COURT OF OREGON for that purpose.

* Jackson v. Lawton, 10 Johnson, 24; Boggs v. Mining Company, 14 California, 363–4.

BRONSON *v.* RODES.

1. A bond, given in December, 1851, for payment of a certain sum, in gold and silver coin, lawful money of the United States, with interest also in coin, at a rate specified, until repayment, cannot be discharged by a tender of United States notes issued under the Loan and Currency Acts of 1862 and 1863, and by them declared to be lawful money and a legal tender for the payment of debts.
2. When obligations made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars.

ERROR to the Court of Appeals of the State of New York.

The facts shown by the record were these:

In December, 1851, one Christian Metz, having borrowed of Frederick Bronson, executor of Arthur Bronson, fourteen hundred dollars, executed his bond for the repayment to Bronson of the principal sum borrowed on the 18th day of January, 1857, *in gold and silver coin*, lawful money of the United States, with interest, also in coin, until such repayment, at the yearly rate of seven per cent.

To secure these payments, according to the bond, at such place as Bronson might appoint, or, in default of such appointment, at the Merchants' Bank of New York, Metz executed a mortgage upon certain real property, which was afterwards conveyed to Rodes, who assumed to pay the mortgage debt, and did, in fact, pay the interest until and including the 1st day of January, 1864.

Subsequently, in January, 1865, there having been no demand of payment, nor any appointment of a place of payment by Bronson, Rodes tendered to him United States notes to the amount of fifteen hundred and seven dollars, a sum nominally equal to the principal and interest due upon the bond and mortgage. These notes had been declared, by the acts under which they were issued, to be lawful money and a legal tender in payment of debts, public and private, except duties on imports, and interest on the public debt.*

* See the history of these notes, and of the acts under which they were issued, particularly set out in the opinion of the Chief Justice, in Lane County *v.* Oregon, *supra*, pp. 74–5.

Argument for payment in coin.

At the time of the tender by Rodes to Bronson, one dollar in coin was equivalent in market value to two dollars and a quarter in United States notes.

This tender was refused; whereupon Rodes deposited the United States notes in the Merchants' Bank to the credit of Bronson, and filed his bill in equity, praying that the mortgaged premises might be relieved from the lien of the mortgage, and that Bronson might be compelled to execute and deliver to him an acknowledgment of the full satisfaction and discharge of the mortgage debt.

The bill was dismissed by the Supreme Court sitting in Erie County; but, on appeal to the Supreme Court in general term, the decree of dismissal was reversed, and a decree was entered, adjudging that the mortgage had been satisfied by the tender, and directing Bronson to satisfy the same of record; and this decree was affirmed by the Court of Appeals. The case was now brought here by Bronson for review.

Mr. C. N. Potter, for the plaintiff in error; a brief being moreover filed at the last term (when the cause was ordered to stand continued for reargument at this) by Mr. J. J. Townsend.

Assuming, for the purpose of this discussion, that Congress had power to declare treasury notes a legal tender in payment of private debts, the question, whether a promise to pay a certain number of specie dollars, can be discharged by a tender of the stipulated number of treasury-note dollars, seems to depend upon whether there be, *in fact*, legal-tender dollars of different actual values; and if so, whether courts are prevented, either by positive enactment or public policy, from recognizing this existing fact.

1. As a matter of fact, there are four legal-tender dollars of different value:

1. The gold dollar, coined *since* 1834, of the value of 100 cents (meaning by a cent, 1-100th of a gold dollar of that coinage).
2. The gold dollar, coined *before* 1834, of the value of 106 of the same cents.

3. The silver dollar, now of the value of 103 of the same cents.
4. The treasury-note dollar, now (December, 1868) of the value of 75 of the same cents.

These differences in the value of the coin dollars were not the result of a design by government to coin dollars of different values; but were the result of changes in the relative values of gold and silver.

Now, if the existing differences between these "dollars" can be regarded, let us consider the effect of contracts made with reference to such differences.

2. Although these dollars are not equal in actual value, yet, as each is a "dollar," it can, *therefore*, be used to discharge contracts payable simply in "dollars," *because it complies with the terms of the contract.*

When a man lends money, payable merely in "dollars," he must receive payment in whatever the law may declare to be "dollars" when the contract is enforced. So, if a man were to contract to deliver one thousand barrels of apples, a delivery of so many barrels of merchantable apples—whether pippins, greenings, or other variety of apples—would meet the terms of the contract and satisfy it. But where, in fact, different varieties of one article exist, and the parties contract for the delivery of a particular variety, such a contract is not satisfied by the delivery of an inferior variety of the same article. Therefore, if A. were to contract to deliver B. one thousand barrels of "pippins," he could not meet that obligation by tendering one thousand barrels of inferior fruit. Both the pippin and the greening are apples, and each is good to meet a contract payable generally in "apples." But the greening is not the equal of the pippin. In no proper sense whatever is it of the same legal value; since a portion only of the latter may be sold or exchanged for enough of the former to meet the contract.

Upon the principle, then, of having respect first "to that which is agreed, which is the very basis and foundation of law," and protected by the fundamental law itself, a man who has contracted to deliver one thousand gold dollars of

the coinage prior to 1834, should not be allowed to discharge his obligation by the tender of a thousand gold dollars of the present coinage (worth only nine-tenths of the other) — *unless, indeed,* there be some positive enactment, or some public policy to oblige the court to regard these things, unequal in themselves, as equal in law; nor, having agreed to pay one thousand specie dollars generally (which gives him the choice of coinage), should he be allowed to meet his obligation by the tender of one thousand dollars in paper notes, worth nearly a third less than the same sum in coin.

We have, therefore, to inquire whether parties are prevented from contracting with reference to, or courts are prevented from recognizing, this difference in the actual value of the dollars that government has put out. When the law declared the treasury notes "lawful money and a legal-tender," did it mean that a treasury-note dollar should be a lawful dollar, and so meet all contracts payable generally in "dollars;" or did it further mean that it should be taken and deemed not only as a dollar, but as the equal of the coined dollars?

3. No value has been prescribed for the treasury-note dollar by statute; nor is there anything in the law to prevent private parties from contracting with reference to the actual existing difference in value of the different dollars.

Assuming that Congress had power to pass such a law, it might have declared, not only that treasury notes should be legal dollars, but that in law they should have the same value as coin dollars; and then, in the eye of the law, the paper would have to be regarded as equal to the coin, and by a legal fiction the court would be forced to treat the less and the greater as equal.

But Congress has not so legislated. It has simply declared that the treasury note shall be a legal tender in payment of debts as a "dollar." As such, it is efficacious to satisfy all debts, according to the amount of the debts, estimated in dollars. But estimated in which dollars? Estimated in the legal dollar of least value; for it is in that

dollar that debts are always computed, since the debtor has the option to pay the debt in such dollars of least value.

There was, indeed, no occasion for legislation, fixing the value of the treasury-note dollar; but the contrary. Probably, not the ten-thousandth part of the debts due in the country, was due in any particular specified dollar, but only in "dollars" generally; and every possible advantage or credit which could be conferred on government paper was given it, by enabling it to meet obligations payable in "dollars" generally, in which the great mass of the engagements of the country were expressed.

4. Congress by its legislation, and the government by its practice, have uniformly recognized the difference in value between the coin and paper dollar.

As to the legislation of Congress: The Legal Tender Act itself discriminates (§ 1), against the treasury-note dollar for the payment of duties.

So, subsequent legislation. The act of March 17, 1862, authorized the purchase of coin with treasury notes on the most advantageous terms. The act of June 17, 1864, declared that thereafter loans of coin should not be made *unless made payable in coin;* thus assuming the legality of all coin loans. The act of March 10, 1866, required all returns of income to state whether made in legal tender currency or coin; and if in coin, then the assessor was to increase the assessment to the equivalent income in paper. The act of March 10, 1866, chapter xv, § 4, assumed loans of coin to be valid; and the various acts of 1861–2 authorized loans, some to be paid specially in coin, and others not.

As to the practice of the government: The government has some loans payable specially in coin and others payable in lawful money generally; it borrows coin to be repaid in coin, and treasury notes to be repaid in treasury notes. It daily issues bills, checks, and obligations payable in "gold" and payable in "dollars" simply, *i. e.*, in currency. It keeps its accounts of specie and currency distinct and reports each separately. It sells commodities for coin only, and buys and sells coin for currency. It estimates taxes on sales of

gold according to the market value of the gold. In all returns of taxes and income it requires coin to be turned into the equivalent currency. It taxes all legacies of coin at their equivalent in currency, and receives only coin for duties.

5. There is no reason or warrant for holding the different dollars of equal value in law; nor for refusing to recognize the actual existing difference in their values.

If the greater and the lesser dollars are to be regarded as of the same value in law, what *must* follow?

A. lends B. £1000 sterling, worth to-day $7000 in treasury-note dollars. By this doctrine he can recover for his £1000 only $4844.

A. dies, leaving among his effects 100,000 gold dollars. His administrator takes them, exchanges them for 200,000 treasury-note dollars, distributes to A.'s heirs in treasury notes, one-half of this sum, and pockets the residue.

An army officer seizes 100,000 gold dollars as enemy's property, exchanges it for 200,000 treasury-note dollars, and accounts to his government for only 100,000 of these dollars, and retains the residue for himself.

I deliver $10,000 in coin to a carrier. He may sell the coin for $14,000 of treasury notes, tender me $10,000 of these notes, and so discharge himself and keep the balance.

I deposit $10,000 in coin for safe keeping with my banker. I go for it next week, and if he pleases, I must be content to take $10,000 of treasury notes.

My broker collects my government coupons in gold, and, according to this doctrine, pays me the legal equivalent when he hands me over *the same nominal amount of currency dollars.*

A merchant sends his clerk with gold to pay duties, and he sells it, keeps the premium, and returns you the like sum in treasury notes, and you must rest satisfied.

And then, finally, as you must pay your duties in coin, you sell your goods at a reduced price for coin; and the buyer takes them and counts you out the reduced price in treasury notes.

And so on indefinitely, through all the transactions of life.

Of course, such monstrous injustice is appalling. It is so obviously against, instead of for, public interest and policy, that counsel will endeavor to distinguish between the rule for torts and contracts. This reluctance, however, to carry out to its logical results the notion that "the policy of the law requires the courts to insist upon the fiction of the equality of dollars," only indicates the fallacy of the notion.

6. The true object and policy of the law is to recognize the actual differences which exist between the different dollars.

The debts of the country were, with scarcely an exception, at the time the Legal Tender Act was passed, payable in "dollars" simply, *i. e.*, in what the law might determine to be dollars. To make treasury notes "dollars," and thus meet those debts (and dues to the government), was to give these notes every possible value and create for them every possible demand, while violating no contract and establishing no forced valuation. Once issued, it was unavoidable that men should contract, deal, and compute with reference to the actual available value of these notes; and, to have attempted to prevent this by insisting that this treasury-note dollar should be deemed equal to the coin dollar, was to repeat a legislation which has always failed, and to have decreed a forced circulation and valuation which would have jeoparded the credit of the country and the chances of its new financial plan.

7. These different dollars are not made of the same value by calling them by the same name.

The confusion about this question arises from treating *different things as the same thing because they are called by the same name;* and from failing to bear in mind that, in estimating what should be paid in articles of different value but having the same name, the estimate should always be made in the variety *of least value, since in that the recovery may be discharged.*

The fallacy of confounding the distinctions between dollars consists in assuming that because they are equally good for a certain and most important purpose (that of meeting contracts payable in dollars generally), they are therefore

the equivalent of each other. A debt is the amount due in "dollars" merely; the treasury note meets the debt because it is a dollar, not because it is the equal of a coin dollar; because it is one of the class that the contract calls for, and thus comes up to the contract, not because it is the equal of the best of its class. On a debt of one hundred gold dollars, and one hundred lawful dollars, the same amount is not now due; the same number of dollars is due, but not of the same kind. Just as a dozen large eggs and a dozen small ones are equally good to meet an agreement to deliver eggs simply. Both are eggs, but not therefore in all respects of equal value, for only the one will satisfy a contract for large eggs.

8. But even if the different dollars were of the same intrinsic value, parties should be left at liberty to discriminate between them.

Why should not parties be at liberty to discriminate and contract with reference to a difference between the coined and paper dollar, even if they were of the same *intrinsic* value? We frequently hear of sales of Washington cents, and of dollars of certain years' coinage, at very high prices. It was never suggested before the Legal Tender Act that such sales were not legal, and that if a man agreed to pay fifty dollars for one dollar of the coinage of the year 1808 he should not pay it.

So, at times when gold is being shipped abroad, double eagles will command a premium over smaller gold coins, because of the greater facility with which they may be counted, handled, and packed. But it has never been suggested that an agreement to pay a premium for double eagles, although the payment was in coins of intrinsically the same value, could not be enforced, for the reason that "the law cannot permit a discrimination between the different dollars, without allowing its authority to be annulled."

9. The true meaning of an obligation to pay "one thousand dollars in gold" is, that the debtor will pay *one thousand gold dollars;* not so much gold as equals one thousand lawful, *i. e.*, treasury-note dollars.

10. The weight of authority is *now* in favor of the recognition by the courts of the existing distinction in value between the different dollars. [The counsel here cited numerous authorities, many not yet regularly reported, and given therefore from law periodicals, newspapers, MSS., etc.]

11. Congress has no power to restrain private citizens from contracting with reference to the dollars it puts forth; nor to prohibit the State courts from giving effect to contracts in respect of such difference.

Mr. S. S. Rogers, by brief filed, contra; Mr. Rogers filing with his brief the opinions of Daniel, J., of the Supreme Court of New York, and of Smith, J., of the Court of Appeals; both largely quoted in the argument.

The different acts of Congress, under which the treasury notes in question were issued, declare that they "shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."* Since the organization of the General Government, Congress has been in the habit of prescribing the combinations and weights of the gold, silver, and copper coins, issued by virtue of its authority, and of declaring the extent to which they could be lawfully tendered in payment of debts. The composition and weight of the coins issued have not been entirely uniform, and owing to that circumstance not of the same intrinsic value, but still Congress has declared them to be of the same legal or nominal value of those coins possessing greater intrinsic value, though limiting the extent to which they might be used as lawful tender for the payment of debts. In 1834, when an act was passed providing for the composition and value of gold coin, it was declared that such coin should be receivable in all payments, when of full weight, according to their respective values.† And in 1837 the act declaring the composition and weight of silver dollars, half

* 12 Stat. at Large, 345, § 1, 532, § 710, § 8.

† 4 Stat. at Large, 699, § 1.

dollars, quarter dollars, dimes and half dimes, provided that they should be legal tenders of payment, according to their nominal value, for any sums whatever.* But three-cent pieces, afterwards provided for, were declared a legal tender in payment of debts only to the amount of thirty cents and under.† And when, without changing the composition of the metals, the weight of the silver half dollar, quarter dollar, dime and half dime, was reduced, their use as a lawful tender for the payment of debts was limited to sums not exceeding five dollars.

These statutes, together with the others relating to the same general subject, show that the gold and silver coin of the United States are not necessarily intrinsically worth their nominal values, but are made to bear a conventional value by the force of legislation. And in the exercise of its sovereign authority over this subject, Congress, under its constitutional right "to coin money, regulate the value thereof, and of foreign coin,"‡ has the power of still further debasing the coins of the country, or reducing their weight, or of doing both, as it may deem just and proper. Such debased coin would be, of course, a legal tender for the payment of all debts within the United States.

For the purpose of the present case, the existence of a power in Congress under the Constitution, to make government notes a legal tender for the payment of debts is conceded. The question is whether, assuming that the "legal tender acts" are valid, an obligation to pay so many dollars in gold or silver can be discharged in the notes issued under those acts?

The statutes defining the extent to which the coin and treasury notes of the United States may be rendered available as a tender for the payment of private or individual debts, in no manner discriminate between them, except so far as the amounts that may be so used. Of the silver coins provided for by the acts of 1851 and 1853 the amount is limited. As to these, the limitations imposed are that three-

* 5 Stat. at Large, 137, § 9. † 9 Id. 591, § 11. ‡ Art. 1, § 8, sub. 5.

cent pieces shall not be lawful tender for an amount exceeding thirty cents, and the half and quarter dollars, dimes and half dimes, to an amount exceeding the sum of five dollars. No such limitation, nor any other whatever as to debts between individuals, is placed upon treasury notes. They are made a legal tender in payment of all debts, according to their nominal value. This is complained of as an arbitrary exercise of authority. But it is the same in principle, though it may, from the manner of its use, be different in degree as that which fixes and declares the value of gold and silver coin. In that case, it is not the commercial value of the article which alone determines its value as money, though that undoubtedly is an important element entering into the adjustment of it. But its value as money is determined by the legislative power of the country. That power declares that certain quantities of gold and silver metal, alloyed, moulded and stamped in the manner in which it provides, shall have a certain commercial value, which is ordinarily less than the real value of the weight and quality of the metals used. Under the exercise of that power, the coin acquires a greater value as money than it possesses as a marketable commodity.

The same power is used, though it may be differently derived, which declares and impresses treasury notes with the value they purport to have upon their face. These notes are not deprived of intrinsic value, for they were issued upon the credit of the government, and have the good faith and responsibility of all the people pledged for their redemption. The conviction of that being the case, though not perhaps one quite as tangible to the senses, should be an assurance of actual value for them, equal to that created by the intrinsic value of gold and silver. It was not a mere arbitrary value, therefore, which Congress provided these notes with, but one of an actual value, which at no remote day will extinguish the obligations they create with gold and silver coin.

That this value has been depreciated is true, but this has been done without diminishing the obligation of the paper, and done also in the face of what may be called a certainty

of its final redemption. It is not paper alone of this description that is liable to depreciation. For whenever the value of property is inflated or reduced, that of gold and silver coin is also correspondingly diminished or increased. Changes of this nature frequently occur in all countries engaged in trading or commercial pursuits. On this account, debts contracted when the prices of property are unusually stimulated, are paid with greater difficulty and by greater sacrifices after such prices have receded, while those contracted when such prices are low, are more easily paid, and with less sacrifice of property after those prices have again advanced. In one case, the debtor actually pays less to extinguish the same debt, than is required for the same purpose in the other, though the actual amount of money used is the same in both. Yet coin, through all the commercial changes it may pass, retains the legal value impressed upon it under the authority of the government, even though the holder of it may be unable to obtain half as much with it at one time as he could at another. Treasury notes do the same. The law has impressed them with a legal value equal with that of gold or silver coin of the same denominations for the purpose of paying individual debts with them, and it cannot permit a discrimination against them, in favor of gold and silver, without allowing its authority to be substantially annulled. However the fact may be as to the value as a mere commodity, a treasury note for the sum of one dollar is as completely a legal dollar as a piece of metal of a certain weight and quality, impressed as the law directs, is a legal dollar. The one is no more so than the other for purposes for which the laws have declared them to be of equal value. Where those laws are supreme, that value must be observed and secured by courts of justice, for such courts are required to execute and carry the laws into effect as they are found, without endeavoring to accommodate them to the accidental or premeditated depreciations produced in the currency of the country by the tricks and devices of brokers.

It will be said that this view of the case is unjust to the creditor. But it is not so, unless the interests of creditors

are more to be regarded than the rights of debtors, and are paramount to even the vital needs of the government. It is well understood that in the case of a contract for the future delivery of a commodity of a stipulated quantity and quality, each party takes the risk of a rise or fall in its market value. So, in the case of a contract for the payment of a specified sum, in money, at a future day, each party takes a risk; the debtor, of an appreciation of the currency, the creditor, of its depreciation. It is immaterial whether the change in the value of the currency is caused by the operation of uncontrollable monetary laws, or by the direct exercise of the sovereign power of the government. In either case, it is within the risk. In the extreme peril which threatened the United States in 1861, it was impossible to procure the thousands of millions of dollars needed, at the instant, as it were, to suppress the rebellion and preserve the Federal government, without adopting some measure which would largely disturb all commercial values, by either raising or lowering the purchasing value of the currency, and thus bearing with severity upon either the creditor or the debtor class. The choice of measures, within the warrant of the Constitution, rested with the government itself. The parties to the mortgage in this case, must be presumed to have contracted in full knowledge that Congress had power to authorize the issuing of paper money, and to declare it a lawful tender in payment of pre-existing debts, as they did by the act of 1862, and also to have known that such power of Congress could not be restricted, hampered or evaded by a stipulation in the contract, making the debt payable in metallic money. If by that legislation the value of the creditor's claim has been reduced, the same effect might have been caused, and to the same extent, without the agency of paper money, by simply debasing the gold and silver coin of the country to a sufficient degree, a measure as we have already said unquestionably within the power of Congress. A tender in such debased coin would have been a literal compliance with the contract, upon the defendant's own construction, but it would have been no better for him than was the tender which he refused.

Argument for payment in notes.

The case of an agreement made since the act of 1862 for the payment of a specified sum *in coin*, in consideration of a loan in coin, or upon any other equivalent consideration, and in view of the difference in *market* value existing at the time between coin and treasury notes having the same *legal* value, may differ materially from the present case. The validity of such an agreement, for some purposes at least, is distinctly recognized by the act itself, and, in many cases, contracts of that character may accord with, and even aid, the policy of the statute. But we need not discuss that case.

The next point is, whether the obligation of the plaintiff under the bond and mortgage resolved itself into a debt, so as to be brought within the operation of these laws. Under these statutes the term "debt" seems to import any obligation by contract, express or implied, which may be discharged by money through the voluntary action of the party bound.

If the obligation in this case had been such as required the delivery of one thousand eight hundred gold dollars, and not as it was, to pay one thousand eight hundred dollars in gold or silver coin, it would be in no sense a debt within the contemplation of these statutes, and could not be affected by their provisions declaring treasury notes a lawful tender for the payment of debts. In the case supposed, the obligation would regard dollars, not as currency, but as articles of traffic, or commodities merely. And it could only be performed by the actual delivery of the number and kind of dollars described in it. And in case of failure to perform it, the defaulting party would be liable for whatever value they might have at that time, as distinguished from treasury notes. The damages to be recovered would be the market value of the articles agreed to be delivered. This distinguishes the case before us from the obligations of bailees, who may undertake to carry and deliver specified quantities of gold or silver coin. The obligation can be discharged only either by making such delivery or paying the value in the market of the article agreed to be delivered. The same principle would apply to the case of a person who should

unlawfully convert or appropriate the gold or silver dollars of another. But in this case no specific dollars were to be delivered by the plaintiff to the defendant. His obligation was to pay a specified number of dollars, not to deliver dollars of a specified quality. And as such, it could be extinguished by anything possessing the legal value and character of that quantity of dollars.

Any different construction would be productive of injustice, not only in this case, but in all those where the debtors had inadvertently promised payment of these debts in gold or silver. For if the creditor should be permitted to recover the market value of gold or silver, as distinguished from its legal value, he might, by recovering judgment against his debtor when the premium was the greatest, collect as much more than the real debt owing to him as that premium exceeded the market value of treasury notes. For, by holding his judgment and delaying its collection until the difference between the cheaper legal currency in which it would be payable and gold and silver entirely disappeared, it would be as easy for the debtor to pay them in the latter as it would in the former. And as he would be bound to pay in one or the other, the creditor would recover as much more than his actual debt, as treasury notes were depreciated below gold and silver when the judgment was recovered. The law intended to subject debtors to no such consequences as these.

No injustice will ordinarily result to the creditor from this construction given to the statutes and covenants in question. For although the creditor may be compelled by it to receive payment of the debt due to him in notes depreciated below their nominal value in the market, the period of that depreciation will, as we have said, soon pass over, and their actual value be restored to that of gold and silver. And at all times, even when most depreciated, they have been convertible, as all know, into the stocks of the United States, upon which the interest, and, at their maturity, the principal, were payable in coin. No persons have had less ground for complaint against treasury notes as a legal tender, than the capitalist. For though by law obliged to receive them at

their nominal value, he had the ability to invest them for the same amount, at legal rates of interest, and when the time for their redemption arrives he has the responsibility of the government for their payment; whatever losses their depreciation may have entailed on those who received them for their labor and expended them for their sustenance, none of those losses have been borne by him, as long as the amount of his capital has continued unimpaired.

It can make no difference in the application of the rule prescribed by the statutes, that the bond and mortgage were executed before their enactment, for the rule is a general one, allowing all debts to be discharged by that which may be lawfully tendered at the time the payment of them may be made.* This principle has been applied to the payment of debts contracted before, as well as those contracted since. Treasury notes were declared by the statutes authorizing them to be a legal tender, even though the laws of the contract provided for their payment in gold and silver coin. Before the enactment of those statutes all debts were so payable, when they were not expressly agreed to be payable otherwise. And where the contract expressly rendered them payable in gold or silver, it did but duly express what the law without that as explicitly implied. Congress has intervened by means of these statutes, and for the purpose of promoting the paramount interests of the country, so far defeated the intention of the contracting parties as to allow all private debts to be paid with treasury notes. The obligation to receive them is no higher in one case than it is in another. It applies to all in the same manner. Accordingly, the Supreme Court of Iowa held that a note, dated in October, 1860, for $700, payable in United States gold, could be paid by that amount of treasury notes.† And the District Court of the County and City of Philadelphia, that a bond for twenty-eight thousand dollars, "in specie, current gold and silver money of the United States," could be dis-

* Faw v. Marsteller, 2 Cranch, 10.

† Warnibold v. Schlicting, 16 Iowa, 244.

charged by treasury notes in the same manner.* The same ruling was made by the Supreme Court of Michigan, in an action upon a bond, $500 of which was payable in gold;† by Justice Agnew, of the Supreme Court of Pennsylvania, where a rent was payable in lawful silver money of the United States of America;‡ by the Supreme Court of Massachusetts, upon a note dated in December, 1861, for $500 payable in specie;§ and by the Superior Court of New York,‖ under a charter-party made in Calcutta, by the terms of which it was payable "in silver or gold dollars, or by approved bills on London," if the cargo was unladen and delivered in the United States.

The CHIEF JUSTICE delivered the opinion of the court.

The question which we have to consider is this:

Was Bronson bound by law to accept from Rodes United States notes equal in nominal amount to the sum due him as full performance and satisfaction of a contract which stipulated for the payment of that sum in gold and silver coin, lawful money of the United States?

It is not pretended that any real payment and satisfaction of an obligation to pay fifteen hundred and seven coined dollars can be made by the tender of paper money worth in the market only six hundred and seventy coined dollars. The question is, Does the law compel the acceptance of such a tender for such a debt?

It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties.

We must, therefore, inquire what was the intent and understanding of Frederick Bronson and Christian Metz when they entered into the contract under consideration in December, 1851.

* Shoenberger v. Watts, 10 American Law Register, 553.

† Buchegger v. Schultz, 14 Id. 95.

‡ Schollenberger v. Brinton, 12 Id. 591.

§ Wood v. Bullens, 6 Allen, 516.

‖ Wilson v. Morgan, 30 Howard's Practice Reports, 386.

And this inquiry will be assisted by reference to the circumstances under which the contract was made.

Bronson was an executor, charged as a trustee with the administration of an estate. Metz was a borrower from the estate. It was the clear duty of the former to take security for the full repayment of the money loaned to the latter.

The currency of the country, at that time, consisted mainly of the circulating notes of State banks, convertible, under the laws of the States, into coin on demand. This convertibility, though far from perfect, together with the acts of Congress which required the use of coin for all receipts and disbursements of the National government, insured the presence of some coin in the general circulation; but the business of the people was transacted almost entirely through the medium of bank notes. The State banks had recently emerged from a condition of great depreciation and discredit, the effects of which were still widely felt, and the recurrence of a like condition was not unreasonably apprehended by many. This apprehension was, in fact, realized by the general suspension of coin payments, which took place in 1857, shortly after the bond of Metz became due.

It is not to be doubted, then, that it was to guard against the possibility of loss to the estate, through an attempt to force the acceptance of a fluctuating and perhaps irredeemable currency in payment, that the express stipulation for payment in gold and silver coin was put into the bond. There was no necessity in law for such a stipulation, for at that time no money, except of gold or silver, had been made a legal tender. The bond without any stipulation to that effect would have been legally payable only in coin. The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment, in the ordinary currency, ought to be accepted.

The intent of the parties is, therefore, clear. Whatever might be the forms or the fluctuations of the note currency, this contract was not to be affected by them. It was to be paid, at all events, in coined lawful money.

We have just adverted to the fact that the legal obligation of payment in coin was perfect without express stipulation. It will be useful to consider somewhat further the precise import in law of the phrase "dollars payable in gold and silver coin, lawful money of the United States."

To form a correct judgment on this point, it will be necessary to look into the statutes regulating coinage. It would be instructive, doubtless, to review the history of coinage in the United States, and the succession of statutes by which the weight, purity, forms, and impressions of the gold and silver coins have been regulated; but it will be sufficient for our purpose if we examine three only, the acts of April 2, 1792,* of January 18, 1837,† and March 3, 1849."‡

The act of 1792 established a mint for the purpose of a national coinage. It was the result of very careful and thorough investigations of the whole subject, in which Jefferson and Hamilton took the greatest parts; and its general principles have controlled all subsequent legislation. It provided that the gold of coinage, or standard gold, should consist of eleven parts fine and one part alloy, which alloy was to be of silver and copper in convenient proportions, not exceeding one-half silver; and that the silver of coinage should consist of fourteen hundred and eighty-five parts fine, and one hundred and seventy-nine parts of an alloy wholly of copper.

The same act established the dollar as the money unit, and required that it should contain four hundred and sixteen grains of standard silver. It provided further for the coinage of half-dollars, quarter-dollars, dimes, and half-dimes, also of standard silver, and weighing respectively a half, a quarter, a tenth, and a twentieth of the weight of the dollar. Provision was also made for a gold coinage, consisting of eagles, half-eagles, and quarter-eagles, containing, respectively, two hundred and ninety, one hundred and thirty-five, and sixty-seven and a half grains of standard gold, and be-

* 1 Stat. at Large, 246. † 5 Id. 136. ‡ 9 Id. 397.

ing of the value, respectively, of ten dollars, five dollars, and two-and-a-half dollars.

These coins were made a lawful tender in all payments according to their respective weights of silver or gold; if of full weight, at their declared values, and if of less, at proportional values. And this regulation as to tender remained in full force until 1837.

The rule prescribing the composition of alloy has never been changed; but the proportion of alloy to fine gold and silver, and the absolute weight of coins, have undergone some alteration, partly with a view to the better adjustment of the gold and silver circulations to each other, and partly for the convenience of commerce.

The only change of sufficient importance to require notice, was that made by the act of 1837.* That act directed that standard gold, and standard silver also, should thenceforth consist of nine parts pure and one part alloy; that the weight of standard gold in the eagle should be two hundred and fifty-eight grains, and in the half-eagle and quarter-eagle, respectively, one-half and one-quarter of that weight precisely; and that the weight of standard silver should be in the dollar four hundred twelve and a half grains, and in the half-dollar, quarter-dollar, dimes, and half-dimes, exactly one-half, one-quarter, one-tenth, and one-twentieth of that weight.

The act of 1849† authorized the coinage of gold double-eagles and gold dollars conformably in all respects to the established standards, and, therefore, of the weights respectively of five hundred and sixteen grains and twenty-five and eight-tenths of a grain.

The methods and machinery of coinage had been so improved before the act of 1837 was passed, that unavoidable deviations from the prescribed weight became almost inappreciable; and the most stringent regulations were enforced to secure the utmost attainable exactness, both in weight and purity of metal.

* 5 Stat. at Large, 137.

† 9 Id. 397.

In single coins the greatest deviation tolerated in the gold coins was half a grain in the double-eagle, eagle, or half-eagle, and a quarter of a grain in the quarter eagle or gold dollar;* and in the silver coins, a grain and a half in the dollar and half-dollar, and a grain in the quarter-dollar, and half a grain in the dime and half-dime.†

In 1849 the limit of deviation in weighing large numbers of coins on delivery by the chief coiner to the treasurer, and by the treasurer to depositors, was still further narrowed.

With these and other precautions against the emission of any piece inferior in weight or purity to the prescribed standard, it was thought safe to make the gold and silver coins of the United States legal tender in all payments according to their nominal or declared values. This was done by the act of 1837. Some regulations as to the tender, for small loans, of coins of less weight and purity, have been made; but no other provision than that made in 1837, making coined money a legal tender in all payments, now exists upon the statute-books.

The design of all this minuteness and strictness in the regulation of coinage is easily seen. It indicates the intention of the legislature to give a sure guaranty to the people that the coins made current in payments contain the precise weight of gold or silver of the precise degree of purity declared by the statute. It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them.

The propositions just stated are believed to be incontestable. If they are so in fact, the inquiry concerning the legal import of the phrase "dollars payable in gold and silver

* 9 Stat. at Large, 398. † 5 Id. 140.

coin, lawful money of the United States," may be answered without much difficulty. Every such dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint of the United States, and therefore declared to be legal tender in payments. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number.

Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count.

We cannot suppose that it was intended by the provisions of the currency acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or of the coined dollars. Our conclusion, therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful.

Arguments and illustrations of much force and value in support of this conclusion might be drawn from the possible case of the repeal of the legal tender laws relating to coin,

and the consequent reduction of coined money to the legal condition of bullion, and also from the actual condition of partial demonetization to which gold and silver money was reduced by the introduction into circulation of the United States notes and National bank currency; but we think it unnecessary to pursue this branch of the discussion further. (Nor do we think it necessary now to examine the question whether the clauses of the currency acts, making the United States notes a legal tender, are warranted by the Constitution.)

But we will proceed to inquire whether, upon the assumption that those clauses are so warranted, and upon the further assumption that engagements to pay coined dollars may be regarded as ordinary contracts to pay money rather than as contracts to deliver certain weights of standard gold, it can be maintained that a contract to pay coined money may be satisfied by a tender of United States notes.

Is this a performance of the contract within the true intent of the acts?

It must be observed that the laws for the coinage of gold and silver have never been repealed or modified. They remain on the statute-book in full force. And the emission of gold and silver coins from the mint continues; the actual coinage during the last fiscal year having exceeded, according to the report of the director of the mint, nineteen millions of dollars.

Nor have those provisions of law which make these coins a legal tender in all payments been repealed or modified.

It follows that there were two descriptions of money in use at the time the tender under consideration was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was, as we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it, in fact, convertible into a coined dollar. It was impossible, in the nature of things,

that these two dollars should be the actual equivalents of each other, nor was there anything in the currency acts purporting to make them such. How far they were, at that time, from being actual equivalents has been already stated.

If, then, no express provision to the contrary be found in the acts of Congress, it is a just if not a necessary inference, from the fact that both descriptions of money were issued by the same government, that contracts to pay in either were equally sanctioned by law. It is, indeed, difficult to see how any question can be made on this point. Doubt concerning it can only spring from that confusion of ideas which always attends the introduction of varying and uncertain measures of value into circulation as money.

The several statutes relating to money and legal tender must be construed together. Let it be supposed then that the statutes providing for the coinage of gold and silver dollars are found among the statutes of the same Congress which enacted the laws for the fabrication and issue of note dollars, and that the coinage and note acts, respectively, make coined dollars and note dollars legal tender in all payments, as they actually do. Coined dollars are now worth more than note dollars; but it is not impossible that note dollars, actually convertible into coin at the chief commercial centres, receivable everywhere, for all public dues, and made, moreover, a legal tender, everywhere, for all debts, may become, at some points, worth more than coined dollars. What reason can be assigned now for saying that a contract to pay coined dollars must be satisfied by the tender of an equal number of note dollars, which will not be equally valid then, for saying that a contract to pay note dollars must be satisfied by the tender of an equal number of coined dollars?

It is not easy to see how difficulties of this sort can be avoided, except by the admission that the tender must be according to the terms of the contract.

But we are not left to gather the intent of these currency acts from mere comparison with the coinage acts. The currency acts themselves provide for payments in coin. Duties on imports must be paid in coin, and interest on the public

debt, in the absence of other express provisions, must also be paid in coin. And it hardly requires argument to prove that these positive requirements cannot be fulfilled if contracts between individuals to pay coin dollars can be satisfied by offers to pay their nominal equivalent in note dollars. The merchant who is to pay duties in coin must contract for the coin which he requires; the bank which receives the coin on deposit contracts to repay coin on demand; the messenger who is sent to the bank or the custom-house contracts to pay or deliver the coin according to his instructions. These are all contracts, either express or implied, to pay coin. Is it not plain that duties cannot be paid in coin if these contracts cannot be enforced?

An instructive illustration may be derived from another provision of the same acts. It is expressly provided that all dues to the government, except for duties on imports, may be paid in United States notes. If, then, the government, needing more coin than can be collected from duties, contracts with some bank or individual for the needed amount, to be paid at a certain day, can this contract for coin be performed by the tender of an equal amount in note dollars? Assuredly it may if the note dollars are a legal tender to the government for all dues except duties on imports. And yet a construction which will support such a tender will defeat a very important intent of the act.

Another illustration, not less instructive, may be found in the contracts of the government with depositors of bullion at the mint to pay them the ascertained value of their deposits in coin. These are demands against the government other than for interest on the public debt; and the letter of the acts certainly makes United States notes payable for all demands against the government except such interest. But can any such construction of the act be maintained? Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?

But we need not pursue the subject further. It seems to us clear beyond controversy that the act must receive the reasonable construction, not only warranted, but required by the comparison of its provisions with the provisions of other acts, and with each other; and that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not "*debts*" which may be satisfied by the tender of United States notes.

It follows that the tender under consideration was not sufficient in law, and that the decree directing satisfaction of the mortgage was erroneous.

Some difficulty has been felt in regard to the judgments proper to be entered upon contracts for the payment of coin. The difficulty arises from the supposition that damages can be assessed only in one description of money. But the act of 1792 provides that "the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all accounts in the public offices, and all proceedings in the courts of the United States, shall be kept and had in conformity to these regulations."

This regulation is part of the first coinage act, and doubtless has reference to the coins provided for by it. But it is a general regulation, and relates to all accounts and all judicial proceedings. When, therefore, two descriptions of money are sanctioned by law, both expressed in dollars and both made current in payments, it is necessary, in order to avoid ambiguity and prevent a failure of justice, to regard this regulation as applicable alike to both. When, therefore, contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally, without such specification.

We have already adopted this rule as to judgments for

duties by affirming a judgment of the Circuit Court for the District of California,* in favor of the United States, for thirteen hundred and eighty-eight dollars and ten cents, payable in gold and silver coin, and judgments for express contracts between individuals for the payment of coin may be entered in like manner.

It results that the decree of the Court of Appeals of New York must be reversed, and the cause remanded to that court for further proceedings.

Mr. Justice DAVIS.

I assent to the result which a majority of the court have arrived at, that an express contract to pay coin of the United States, made before the act of February 25th, 1862, commonly called the legal tender act, is not within the clause of that act which makes treasury notes a legal tender in payment of debts; but I think it proper to guard against all possibility of misapprehension by stating that if there be any reasoning in the opinion of the majority which can be applicable to any other class of contracts, it does not receive my assent.

Mr. Justice SWAYNE.

I concur in the conclusion announced by the Chief Justice. My opinion proceeds entirely upon the language of the contract and the construction of the statutes. The question of the constitutional power of Congress, in my judgment, does not arise in the case.

JUDGMENT REVERSED AND THE CASE REMANDED.

Mr. Justice MILLER, dissenting.

I do not agree to the judgment of the court in this case, and shall, without apology, make a very brief statement of my reasons for believing that the judgment of the Court of Appeals of New York should be affirmed. The opinion just read correctly states that the contract in this case, made before the passage of the act or acts commonly called the legal

* Cheang-Kee v. United States, 3 Wallace, 320.

tender acts, was an agreement to pay $1400 "in gold and silver coin, lawful money of the United States." And I agree that it was the intention of both parties to this contract that it should be paid in coin. I go a step farther than this, and agree that the legal effect of the contract, as the law stood when it was made, was that it should be paid in coin, and could be paid in nothing else. This was the conjoint effect of the contract of the parties and the law under which that contract was made.

But I do not agree that in this respect the contract under consideration differed, either in the intention of the parties, or in its legal effect, from a contract to pay $1400 without any further description of the dollars to be paid.

The only dollars which, by the laws then in force, or which ever had been in force since the adoption of the Federal Constitution, could have been lawfully tendered in payment of any contract simply for dollars, were gold and silver.

These were the "lawful money of the United States" mentioned in the contract, and the special reference to them gave no effect to that contract, beyond what the law gave.

The contract then did not differ, in its legal obligation, from any other contract payable in dollars. Much weight is attached in the opinion to the special intent of the parties in using the words gold and silver coin, but as I have shown that the intent thus manifested is only what the law would have implied if those words had not been used, I cannot see their importance in distinguishing this contract from others which omit these words. Certainly every man who at that day received a note payable in dollars, expected and had a right to expect to be paid "in gold and silver coin, lawful money of the United States," if he chose to demand it. There was therefore no difference in the intention of the parties to such a contract, and an ordinary contract for the payment of money, so far as the right of the payee to exact coin is concerned. If I am asked why these words were used in this case I answer, that they were used out of abundant caution by some one not familiar with the want of power in the States to make legal tender laws. It is very well known that

under the system of State banks, which furnished almost exclusively the currency in use for a great many years prior to the issue of legal tender notes by the United States, there was a difference between the value of that currency and gold, even while the bank notes were promptly redeemed in gold. And it was doubtless to exclude any possible assertion of the right to pay this contract in such bank notes, that the words gold and silver coin were used, and not with any reference to a possible change in the laws of legal tender established by the United States, which had never, during the sixty years that the government had been administered under the present Constitution, declared anything else to be a legal tender or lawful money but gold and silver coin.

But if I correctly apprehend the scope of the opinion delivered by the Chief Justice, the effort to prove for this contract a special intent of payment in gold, is only for the purpose of bringing it within the principle there asserted, both by express words and by strong implication, that all contracts must be paid according to the intention of the parties making them. I think I am not mistaken in my recollection that it is broadly stated that it is the business of courts of justice to enforce contracts as they are intended by the parties, and that the tender must be according to the intent of the contract.

Now, if the argument used to show the intent of the parties to the contract is of any value in this connection, it is plain that such intent must enter into, and form a controlling element, in the judgment of the court, in construing the legal tender acts.

I shall not here consume time by any attempt to show that the contract in this case is a debt, or that when Congress said that the notes it was about to issue should be received as a legal tender in payment for *all private debts*, it intended that which these words appropriately convey. To assume that Congress did not intend by that act to authorize a payment by a medium differing from that which the parties intended by the contract is in contradiction to the express language of the statute, to the sense in which it was acted on by

the people, who paid and received those notes in discharge of contracts for incalculable millions of dollars, where gold dollars alone had been in contemplation of the parties, and to the decisions of the highest courts of fifteen States in the Union, being all that have passed upon the subject.

As I have no doubt that it was intended by those acts to make the notes of the United States to which they applied a legal tender for all private debts then due, or which might become due on contracts then in existence, without regard to the intent of the parties on that point, I must dissent from the judgment of the court, and from the opinion on which it is founded.

[See the next case.]

BUTLER v. HORWITZ.

1. A contract to pay a certain sum in gold and silver coin is in substance and legal effect a contract to deliver a certain weight of gold and silver of a certain fineness to be ascertained by count.
2. Whether the contract be for the delivery or payment of coin, or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States.
3. There are, at this time, two descriptions of lawful money in use under acts of Congress, in either of which (assuming these acts, in respect to legal tender, to be constitutional) damages for non-performance of contracts, whether made before or since the passage of these acts, may be assessed in the absence of any different understanding or agreement between the parties.
4. When the intent of the parties as to the medium of payment is clearly expressed in a contract, damages for the breach of it, whether made before or since the enactment of these laws, may be properly assessed so as to give effect to that intent.
5. When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed in coin, and judgment rendered accordingly.

ERROR to the Court of Common Pleas for Maryland.

Daniel Bowly, on the 18th of February, 1791, leased to Conrad Orendorf a lot of ground in the city of Baltimore,

for ninety-nine years, renewable forever, reserving rent in the following words: "Yielding and paying therefor to the said Daniel Bowly, his heirs and assigns, the yearly rent or sum of £15, current money of Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver at their present established weight and rate according to act of Assembly, on the 1st day of January in each and every year during the continuance of the present demise."

On the 1st of January, 1866, one Horwitz was the owner of the rent and reversion, and a certain Butler of the leasehold interest in the lot. It being agreed that the £15 was equal to $40 in gold and silver, Butler tendered to Horwitz the amount of the annual rent, that is to say $40, then due, in currency, which Horwitz refused to receive, and brought suit to recover the value of the gold in currency, which being on the 1st of January, 1866, at a premium of $1.45, was $58. The court below gave judgment in favor of Horwitz for that amount with interest, $59.71. The case was thereupon brought here by Butler, for review.

Mr. J. R. Quin, for the plaintiff in error; Mr. B. F. Horwitz, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The principles which determined the case of *Bronson* v. *Rodes*,* will govern our judgment in this case.

The obvious intent of the contract now before us was to secure payment of a certain rent in gold and silver, and thereby avoid the fluctuations to which the currency of the country, in the days which preceded and followed the establishment of our independence, had been subject, and also all future fluctuations incident to arbitrary or uncertain measures of value, whether introduced by law or by usage.

It was agreed in the court below that the rent due upon the lease, reduced to current gold and silver coin, was, on the first day of January, 1866, forty dollars; and judgment

* See *supra*, p. 229.

was rendered on the 27th June, 1866, for fifty-nine dollars and seventy-one cents.

This judgment was rendered as the legal result of two propositions: (1.) That the covenant in the lease required the delivery of a certain amount of gold and silver in payment of rent; and (2.) That damages for non-performance must be assessed in the legal tender currency.

The first of these propositions is, in our judgment, correct; the second is, we think, erroneous.

It is not necessary to go at length into the grounds of this conclusion. We will only state briefly the general propositions on which it rests; some of which have been already stated more fully in *Bronson* v. *Rodes*.

A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count. Damages for non-performance of such a contract may be recovered at law as for non-performance of a contract to deliver bullion or other commodity. But whether the contract be for the delivery or payment of coin or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States.

It was not necessary in the case of *Bronson* v. *Rodes*, nor is it necessary now, to decide the question, whether the acts making United States notes legal tender are warranted by the Constitution? We express no opinion on that point; but assume, for the present, the constitutionality of those acts. Proceeding upon this assumption, we find two descriptions of lawful money in use under acts of Congress, in either of which damages for non-performance of contracts, whether made before or since the passage of the currency acts, may be properly assessed, in the absence of any different understanding or agreement between parties. But the obvious intent, in contracts for payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment, warrants the inference that it was the understanding

of the parties that such contracts should be satisfied, whether before or after judgment, only by tender of coin, while the absence of any express stipulation, as to description, in contracts for payment in money generally, warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money.

This inference as to contracts made previous to the passage of the acts making United States notes a legal tender, is strengthened by the consideration that those acts not only do not prohibit, but, by strong implications, sanction contracts made since their passage for payment of coin; and consequently, taken in connection with the provision of the act of 1792, concerning money of account, require that damages upon such contracts be assessed in coin, and judgment rendered accordingly; leaving the assessment of damages for breach of other contracts to be made, and judgments rendered in lawful money. It would be unreasonable to suppose that the legislature intended a different rule as to contracts prior to the enactment of the currency laws, from that sanctioned by them in respect to contracts since. We are of the opinion, therefore, that under the existing laws, of which, in respect to legal tender, the constitutionality is, we repeat, in this case, assumed, damages may be properly assessed and judgments rendered, so as to give full effect to the intention of parties as to the medium of payment. When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly.

It follows that in the case before us the judgment was erroneously entered. The damages should have been assessed at the sum agreed to be due, with interest, in gold and silver coin, and judgment should have been entered in coin for that amount, with costs. The judgment of the Court of Common Pleas must, therefore, be

REVERSED, AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

Mr. Justice MILLER, dissenting.

I believe the judgment of the court below was right, because I understand the original contract to have been an agreement to pay in English guineas, as a commodity, and their value was, therefore, properly computed in the legal tender notes which by law would satisfy the judgment.

I cannot agree to the opinion, for the reasons given in my dissent in the case of *Bronson* v. *Rodes*.

RAILROAD COMPANY v. JACKSON.

1. A State has no power to tax the interest of bonds (secured in this case by mortgage) given by a railroad corporation, and binding every part of the road, when the road lies partially in another State;—one road incorporated by the two States.
2. The Internal Revenue Act of June 30th, 1864, does not lay a tax on the income of a non-resident alien, arising from bonds held by him of a railroad company incorporated by States of the Union, and situated in them.

ERROR to the Circuit Court for the District of Maryland.

The State of Pennsylvania, by certain acts, as expounded by the Supreme Court of that State,* taxed "money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment," imposing three mills on the dollar of the principal, payable out of the interest. And where the money was due by a railroad corporation, they made it the duty of the president, or other officer of the company who paid the coupons or interest to the holder, to retain the amount of the tax.

The United States, also, by certain acts, laid what is known as the income tax.

The first tax of this kind was imposed by the act of Congress passed August 5th, 1861.† The 49th section of that act directed that there should be levied and collected upon

* Maltby v. Railroad Company, 52 Pennsylvania State, 140.

† 12 Stat. at Large, 309.

the annual income of *every person residing in the United States*, from whatever source derived, a tax of 3 per cent. on the amount of the excess of such income over $800; and upon the income, rents, or dividends, accruing upon property, &c., owned in the United States by any *citizen* residing abroad, a tax of 5 per cent.

The next act was passed July 1st, 1862,* and the 90th section of it directed that there should be levied and collected a tax of 3 per cent. on the annual income of *every person residing in the United States*, over $600 and under $10,000; and when exceeding $10,000, a tax of 5 per cent.; and upon the income of citizens residing abroad, a tax of 5 per cent. The next section provided that the portion of income derived from interest on bonds, or other evidences of indebtedness of any railroad company, which should have been assessed and paid by said companies, should be deducted from that prescribed in the previous section; and the 81st section directed that this tax on the bonds and evidences of indebtedness should be paid by the companies, and that they might deduct the same on the payment of interest to the bondholders.

The next act—one more particularly bearing on one part of this case—was that of June 30th, 1864.† This act directed the levy and collection of a tax of 5 per cent. upon the excess of income of *every person residing in the United States*, or of any *citizen* residing abroad, over $600 and under $5000; 7½ per cent. over $5000 and not exceeding $10,000; and a tax of 10 per cent. over $10,000. Subsequent sections‡ provided for the deduction from all payments on account of interest arising out of bonds of railroad companies, as in the act of July 1st, 1862, and enacted that the payment by the company of the said duty so deducted from the interest, should discharge the company from that amount of interest on the bonds "so held by any person or persons whatever," except where the companies might have contracted otherwise.

* 12 Stat. at Large, 473. † 13 Ib. 281, § 116. ‡ §§ 117, 122.

Statement of the case.

In this state of the statutes of Pennsylvania and of the United States, Jackson, an alien resident in Ireland, brought suit, in the court below, against the Northern Central Railway Company, a company incorporated by the State of Maryland, to recover the amount of certain coupons attached to bonds issued by the company and held by him. The form of them was as follows:

"The Northern Central Railway Company will pay to the bearer, January 1, 1865, thirty dollars, being a half year's interest on bond No. 1827, for one thousand dollars.

"J. S. LIEB, *Treasurer.*"

The plaintiff proved a demand of payment, at the company's office in Baltimore (where the coupons were payable), and that the company offered to pay the amount of them, deducting a tax of 5 per cent. per annum to the United States, under the acts of Congress; and a further tax of three mills per dollar of the principal of each bond asserted to be due to the State of Pennsylvania, but would not pay more. Offer of such payment was refused. He also gave in evidence charters incorporating the Northern Central Railway Company by the State of Maryland, and by that of Pennsylvania, and rested.

The defendant then gave in evidence the articles of consolidation of four railroad companies, one of which had been incorporated by the State of Maryland, and the three others by the State of Pennsylvania, embracing a line of road extending from Baltimore, in Maryland, to Sunbury, in Pennsylvania, about a third or fourth of the whole road only being in the former State.

This consolidation was entered into by the respective companies in pursuance of acts of the legislatures of the two States; and by means of them the four companies were merged in one, called the Northern Central Railway Company, and was incorporated by the same name by the legislature of each State. The stockholders of the old companies received from the new twice the number of shares held by them in the old, upon the receipt of which the old shares

Argument in support of the tax.

were cancelled, after this company was thus organized, and the directors elected. On the 20th of December, 1855, the company executed a mortgage to a board of trustees upon the entire line of its road from Baltimore to Sunbury, including all its property and estate situate within *both* the States, which mortgage was given to secure the payment of $2,500,000 in bonds, to be issued in amounts therein specified. The bonds were issued by the company accordingly. And it was upon the coupons of a portion of them in the hands of the plaintiff that this suit was brought.

The court below charged, that if the plaintiff, when he purchased the bonds, was a British subject resident in Ireland, and now resided there, he was entitled to recover the amount of the coupons without deductions. It was the correctness of this charge which, after verdict and judgment in accordance with it, was the subject of the question here.

Mr. Bernard Carter, for the railroad company, appellant, contended, that the State of Pennsylvania, as well as the United States, had a right to impose the taxes, and the fact that Jackson was a British subject and resident abroad was unimportant.*

That the taxes in question were not taxes on the person of Jackson, but on his property, which in this case was the debt due to him, as evidenced by the company's bonds. The real or personal property of a non-resident alien, would confessedly be a proper subject for taxation, at the place where it is located, because of the protection and other benefits conferred upon it by the taxing power. Now the alien in this case was the holder of bonds the payment of which was wholly and solely secured to him by property situated here, and while this government extended its protection and its laws over the property, out of which those bonds were to be paid, there was no reason why it should not, for such protection and to the extent of his interest in the property so

* McCulloch *v.* State of Maryland, 4 Wheaton, 429; Providence Bank *v.* Billings, 4 Peters, 561; Milne *v.* Moreton, 12 Wheaton, 358; Harrison *v.* Sterry, 5 Cranch, 289.

protected and benefited, demand of the plaintiff (although an alien, and as such excepted from the *general* income duty imposed by the one section of the act of 1864), an equivalent in the shape of the tax imposed by the subsequent sections. The debt, for the purposes of taxation, had its location here.*

Messrs. W. A. Fisher and G. H. Williams, contra, contended, that the statute of Pennsylvania, rightly construed, did not tax interest; and that even if it did, that State had no right to tax the coupons on bonds where both debtor and creditor were outside her territory, and neither of them her subjects. Such an attempt would be *ultra vires.*

So, by the true construction of the internal revenue act of Congress of June 30th, 1864, that it was not intended to tax incomes, except of *citizens* of the United States *wherever resident,* and of *residents,* whether citizens or not; that here, too, even if Congress had made an attempt to tax the incomes of foreigners resident in their own countries, it would have been "*ultra vires.*"† A corporation in the United States, when it borrows money from a foreigner abroad, creates a debt, whose locality is always the locality of the creditor; and to tax it, or the annual interest due on it, is to tax him, resident abroad and not a subject of the taxing power, for that which, in contemplation of law, is also outside the country.‡ This plainly was illegal.

Mr. Justice NELSON delivered the opinion of the court.

It has been argued for the plaintiff, that the acts of the legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject; for, it is not to be denied, as the courts of the State have expounded these laws, that they authorize the deduction, and, if no other objection ex-

* Gordon *v.* Appeal Tax Court, 8 Howard, 133, 140, 150; Appeal Tax Cases, 12 Gill & Johnson, 117.

† McCulloch *v.* State of Maryland, 4 Wheaton, 429; Union Bank *v.* The State, 9 Yerger, 501.

‡ The Apollon, 9 Wheaton, 370.

isted against the tax, the defence would fail. If this was an open question we should have concurred with the interpretation of the court below, which concurred with the views of the plaintiff's counsel. Nor shall we inquire into the competency of the legislature of Pennsylvania to impose this tax, upon general principles, as we shall place the objection upon other and distinct grounds, though we must say, that the tax upon the promissory note or bond, given by the resident debtor, and the withholding of the amount from the interest due to the non-resident holder, would seem to be a tax upon such non-resident. It is not a tax of the money lent, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond, which is in the hands of the non-resident holder.

The ground upon which we place the objection in this case, to the tax is, in brief, that the bonds, amounting to $2,500,000, of which those in question are a part, were issued by this company upon the credit of the line of road, its franchises and fixtures, extending from Baltimore to Sunbury, a given portion of which line lies within the jurisdiction of the State of Maryland. The old company, to which this line belonged, by the act of consolidation, transferred it, with its fixtures and all other interests connected therewith, including their stock, to the new organization which have issued these bonds. The security therefore pledged and bound for the payment of them and of the interest embraces this Maryland portion of the road; and in case of a failure to pay the principal or interest, this portion with its franchises and fixtures would be liable to sale in satisfaction of the bonds and interest.

Now, it is apparent, if the State of Pennsylvania is at liberty to tax these bonds, that, to the extent of this Maryland portion of the road, she is taxing property and interests beyond her jurisdiction. This portion avails her tax-roll as effectually as if it was situate within her own limits. The Maryland portion is not liable for the payment of any specified part, or quantity of these bonds thus taxed, but is liable, with all its interests, for the whole amount, the same as that

portion of the road within the State of Pennsylvania. The bonds were an issue, in the usual way, by this Northern Central Railway Company, and the security given by mortgage on the entire line of the road. No portion of the bonds belong to one part more than to another. No severance was made of the bonds, and, therefore, none can be made, in the taxation, with reference to the line within the respective jurisdictions of the States. If the tax is permitted as it respects one bond, it must be as it respects all.

Again, if Pennsylvania can tax these bonds, upon the same principle, Maryland can tax them. This is too apparent to require argument. The only difference in the two cases is, that the line of road is longer within the limits of the former than within the latter. Her tax would be a more marked one beyond the jurisdiction of the State, as the property and interest outside of its limits would be larger.

The consequence of this tax of three mills on the dollar, if permitted, would be double taxation of the bondholder. Each State could tax the entire issue of bonds, amounting, as we have seen, to $2,500,000.

The effect of this taxation upon the bondholder is readily seen. A tax of three mills per dollar of the principal, at an interest of six per centum, payable semi-annually, is ten per centum per annum of the interest. A tax, therefore, by each State, at this rate, amounts to an annual deduction from the coupons of twenty per centum; and if this consolidation of the line of road had extended into New York or Ohio, or into both, the deduction would have been thirty or forty. If Pennsylvania must tax bonds of this description, she must confine it to bonds issued exclusively hy her own corporations.

Our conclusion on this branch of the case is, that to permit the deduction of the tax from the coupons in question, would be giving effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction.

The next question is, whether or not the coupons were

subject to a tax of five per centum per annum to the United States on the 1st of July, 1865, when they became due?

The act in force when the coupons in question fell due, was the act of June 30, 1864,* and is the one by which the tax of five per centum claimed on the bonds of the plaintiff must be determined. The court below held that the act did not include a non-resident alien, and directed a verdict and judgment for the whole amount of interest. The decision was placed mainly on the ground that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad, and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view. It is not important, however, to pursue the argument, as Congress has since, in express terms, by the acts of March 10th, and July 13th, 1866, imposed a tax on alien non-resident bondholders. The question hereafter will be, not whether the laws embrace the alien non-resident holder, but whether it is competent for Congress to impose it; upon which we express no opinion.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD (with whom concurred Mr. Justice SWAYNE), dissenting:

I dissent from the opinion and judgment of the court in this case, because I think the taxes in question, both State and Federal, were legally assessed, and that the officers of the railway company properly deducted the same from the amount of the coupons described in the declaration.

* See *supra*, 268.

LITCHFIELD v. RAILROAD COMPANY.

Where in an action (under the laws of Iowa) to recover land—the plaintiff averring that he claims and is entitled to the land, the defendant denying such right of possession but setting up no title in himself—there has been a reversal in this court and a mandate "to enter judgment for the defendant below," an entry by the court below that the defendant "hath *right* to the lands claimed in the declaration" is erroneous. The judgment should have been that the plaintiff hath no title. Reversal and mandate accordingly.

ERROR to the Circuit Court for Iowa.

Mr. Litchfield, for the plaintiff in error; Mr. Grant, contra.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

The record shows this state of facts: Litchfield, the plaintiff in error, brought an action to recover the land described in his declaration, averring that he claimed and was entitled to possession. The defendant, the Railroad Company, denied the allegation of his right of possession. It set up no title in itself. The case went to trial upon the issue so made, and a judgment was rendered in favor of the plaintiff. The Railroad Company brought the case into this court by a writ of error. The judgment was reversed, and a mandate was sent to the court whence the cause came, commanding it "to enter judgment for the defendant below." That court accordingly entered judgment as follows:

"It is therefore ordered and adjudged, that the plaintiff has no title to the lands in dispute, and that the plaintiff pay all costs taxed at $——, and that execution issue therefor."

This was done at the October Term, 1861, of that court.

At the same term, the court, on the motion of Litchfield, set aside the judgment so entered, and granted him a new trial. At the October Term, 1863, on his motion, the suit was dismissed, and a judgment was rendered against him for costs. At the December Term, 1863, of this court, a writ of mandamus was issued, whereby the court below was com-

manded to vacate the order granting a new trial, and to enter a judgment in favor of the Railroad Company, according to the mandate sent down upon the reversal of the judgment. The Circuit Court, at the October Term, 1864, did accordingly vacate the order granting a new trial. The entry, after doing this, proceeds as follows:

"And it is further considered and adjudged, that the said defendant, the said Dubuque and Pacific Railroad Company, *hath right to the lands claimed in the declaration*—that is to say, section one (1) in township eighty-eight north, in range twenty-nine (29) west of the fifth principal meridian, and lying in the northern division of the State of Iowa, and to the possession thereof, and that the said defendant recover of the plaintiff the costs in this cause accrued, taxed at $——, and have execution therefor."

Litchfield excepts to this judgment, and insists—

That the right of the Railroad Company to the land in controversy was never in issue, and never decided;

That the second judgment, in so far as it determines that the company had such right, is erroneous, and unwarranted by the mandate and by the writ of mandamus from this court;

And that it should have been like the first judgment, that the plaintiff had no title to the land, &c.

We think these objections well taken, and that the judgment entered pursuant to the mandamus should have been like the prior one, simply in favor of the defendant upon the issue joined and for the costs. This proceeding is the proper one to correct the error complained of.* There can be no doubt of the power of the court to vacate the order of dismissal, and to reinstate the case, independently of the order contained in the writ of mandamus.† If there could otherwise be any doubt upon the subject, the command of the writ is conclusive as to the proceedings had in conformity to it.

* Martin v. Hunter's Lessee, 1 Wheaton, 354.

† Ex parte Bradstreet, 7 Peters, 648; Litch v. Martin, 10 Western Law Journal, 495; Atkins v. Chilson, 11 Metcalf, 112.

If, since the commencement of this suit, the plaintiff has acquired a title to the land, as he insists, that title can be asserted only in a new action.* After the decision by this court, the court below had no power but to enter a judgment according to the mandate, and to carry that judgment into execution. This was the end of the case.†

The judgment before us is REVERSED. The cause will be remanded to the Circuit Court, with directions to enter a judgment

IN CONFORMITY TO THIS OPINION.

RAILROAD COMPANY v. SCHURMEIR.

1. The meander-lines run in surveying fractional portions of the public lands bordering upon navigable rivers, are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser.
2. Congress, in providing, as it does, in one or more acts relating to the survey and sale of public lands bordering upon rivers—that navigable rivers, within the territory to be surveyed, should be deemed to be public highways, and that where the opposite banks of any stream, not navigable, should belong to different persons, the stream and the bed thereof should become common to both—meant to enact that the common law rules of riparian ownership should apply in the latter case, but that the title to lands bordering on navigable streams should stop at the stream, and not come to the *medium filum*.
3. But such riparian proprietors have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as riparian proprietors on navigable waters, affected by the ebb and flow of the tide.
4. A government grant of land in Minnesota (9.28 acres), bounded on one side by the Mississippi, was *held* to include a parcel (2.78 acres) four feet lower than the main body, and which, at very low water, was separated from it by a slough or channel twenty-eight feet wide, through which no water flowed, but in which water remained in pools; where, at medium water, it flowed through the depression, making an island of the parcel; and where, at high water, the parcel was submerged; the whole place

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* McCool *v.* Smith, 1 Black, 459.

† Ex parte Dubuque and Pacific Railroad Co., 1 Wallace, 73.

having, previous to the controversy, been laid out as a city, and the municipal authorities having graded and filled up the place to the river edge of the parcel.

5. If, by the laws in force in Minnesota, in 1859, the recording of a town or city plot, indicating a dedication, for a public purpose, of certain parts of the land laid out, operated as a conveyance, in fee, to the town or city, yet, it could operate only as a conveyance of the fee, subject to the purpose indicated by the dedication, and subject to that it must be held by any future claimant.

ERROR to the Supreme Court of Minnesota.

Schurmeir filed a bill in one of the inferior courts of Minnesota, to enjoin the St. Paul and Pacific Railroad Company from taking possession, and building its railroad upon, certain ground in the city of St. Paul, Minnesota, bordering on the Mississippi, and originally a fractional section of the public lands. The place was alleged, by Schurmeir, to be a public street and landing.

The railroad company justified their entry, as owner, in fee of the *locus in quo*. The issues between the parties were tried by a referee, who found both facts and law in favor of Schurmeir. The facts, so found, being undisputed, the case was removed, for decision on them, to the Supreme Court of the State. That court affirming the referee's judgment, the case was here for review.

The case—to understand which well, it is necessary to refer, in a preliminary way, to certain statutes of the United States governing the surveys and descriptions of public lands—was thus:

Certain statutes enact,* that the public lands shall be subdivided into townships, sections, and quarter sections, and that these subdivisions shall be bounded by north and south and east and west lines, unless where this is rendered impracticable *by meeting a navigable water-course*, &c. The boundaries, and contents of the several sections and quarter sections, are to be ascertained in conformity to the following principles:

* Acts of May 18, 1796, 1 Statutes at Large, 446; May 10, 1800, 2 Id. 73; and February 11th, 1805, 2 Id. 313.

"The boundary line actually run, and marked in the surveys returned, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof; and the boundary lines which shall not have been actually run and marked as aforesaid, shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but, in those portions of the fractional townships where no such opposite corresponding corners have been, or can be fixed, the said boundary lines shall be ascertained by running from the established corners, due north and south or east and west lines (as the case may be), *to the water-course, . . . or other external boundary of such fractional township.*"

There is apparently no law which requires what is hereafter spoken of, and called the "meandering" of water-courses; but the acts of Congress, above referred to, do require the *contents* of each subdivision to be returned to, and a *plat of the land surveyed*, to be made by the surveyor-general; and this makes necessary an accurate survey of the meanderings of the water-course, where a water-course is the external boundary; the line showing the place of the water-course, and its sinuosities, courses, and distances, is called the "meander-line."*

The original act of 17th May, 1796, providing for the sale of these lands, enacts, "that all navigable rivers within the territory to be disposed of, shall be deemed to be, and remain public highways; and in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both."†

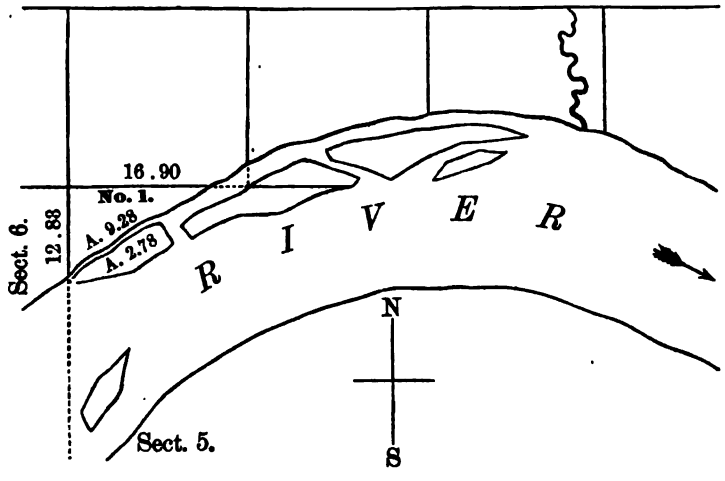
The premises on which the railroad company sought to enter, were situated upon a fractional section, duly surveyed by the government surveyor, in October, 1847; the survey

* See the able opinion of Wilson, C. J., in 10 Minnesota, 99, 100, from which this account is extracted.

† And see act of April 16, 1814, 8 Statutes at Large, 125, as explained by act of February 27, 1815, Ib. 218.

Statement of the case.

duly approved in March, 1848, and returned to the General Land Office. This fractional section was designated by this survey as lot 1, in section 5, township 28, north of range 22, west of the fourth principal meridian. It was represented by the plat thereof, as bounded on the north by the east and west sectional line, on the west by the north and south sectional line, and on the only other remaining side by the Mississippi River. It was this river that interposed and made this section a fractional one.



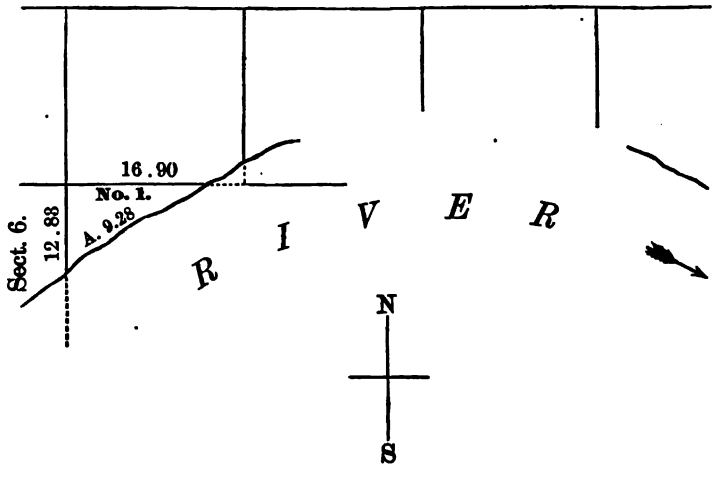
At the time of the survey, there was a parcel of land (called by the counsel on one side, a sand-bar, reef, or "tow-head," and by the counsel on the other, an island) lying along the shore of the river, about four feet lower than the main land of the fraction, and with a channel or slough between it and the main land. This depression was about 28 feet wide, and the bar or island, in its extreme width, was about 90 feet. Its extreme length was about 160 feet. The main body contained 9.28 acres; this parcel, 2.78 acres.

In high water this parcel of land outside was completely under water; in medium water it was exposed to view, and the water flowed through the depression; but, at very low water there was no *flow* of water through the depression.

It lay in pools in the depression. Very low water-mark was thus the exterior part of the bar or island, and the landing-place for boats plying on the Mississippi had always been the south or river side of the island.

In the government survey, no mention of, or reference to, this bar or island, was in any way made in the field-notes, plat, or map. The fractional parcel, as already said, was represented as lying immediately upon, and bounded by, the Mississippi River.

The surveyor, however, in meandering the course of the river along the fraction, ran the "meander-lines" along the main land of the shore, and not along the southerly line of this bar or island, and thus did not include the space occupied by this depression, and bar or island, in his estimate of the quantity of land contained in the fraction. The field-notes showed that the line running 12.83 south, from corner sections 5 and 6, intersected the *bank* of the Mississippi River, and that a meander-post was there set; also, that at a point 16.90 east of said section corner, the township line intersected the left *bank* of the Mississippi River, and



that a meander-post was there also set. The meander-line was run, beginning at last-mentioned meander-post, "*thence*

up stream, south 61, west 6.50; south 54, west 6.00; south 46, west 5.00; south 40, west 3.96, to line of sections 5 and 6, at lower end of St. Paul."

In March, 1849, the United States sold and conveyed the land to one Roberts; the patent describing the lot (along with another fractional section, styled No. 2, not connected with this case) as containing so many acres, "according to the official *plat* of the survey;" a plat which, as already said, did not present the bar or island, in any way, nor the channel or slough between, but presented the river as the boundary; much as in the map on the page opposite (page 276).

In the same spring, Roberts surveyed, laid out, and platted the whole of this fractional parcel (including the bar or island, and intervening depression, in his plat, and as a part of the grant of his patent) into towns, blocks, lots, streets, &c., constituting a part of the town of St. Paul, and caused said plat to be duly recorded; an act which, by the laws of Wisconsin (at that time in force in Minnesota), operated to vest the fee simple of every donation or grant to the public, or any corporation or body politic, in it, for the uses therein named, and no other; and which declared, that "land *intended* to be for *streets*, alleys, *ways*, commons, or *other public use*, . . . or for any addition thereto, shall be held in the corporate name, in trust, to and for the uses and purposes set forth, and expressed or intended." Roberts subsequently sold to Schurmeir two lots, designated on the plan as lots Nos. 11 and 12, in block 29. All the space in front of this block, and between this block and the river, was designated as "*Landing;*" and as soon as St. Paul was organized into a city, it exercised municipal control over the space, established a grade, and caused the place to be more or less graded; maintaining it as a landing. Schurmeir's two lots, and the whole of the so-called "landing," were situated upon what had been the slough or channel.

In 1856, and after this depression had been filled, and the whole space between the lots and the river, including the depression, and the bar or island, had been graded by the city, and traces of both had been effaced, the space origi-

Argument for the railroad company.

nally occupied by this bar or island, was surveyed by a government surveyor, and platted and mapped as "Island No. 11," in said section 5.

By virtue of this survey, the railroad company claimed the title under a Congressional land grant of May 22, 1857.

The important question in the case was, therefore, this: By what exact line was the grant bounded on the river side? Was it—

1. By either the *medium filum* of the Mississippi, or the outside of the sand-bar or island? Or was it—

2. By the meander-lines run by the surveyor?

If by either of the former, the railroad company had no right.

If by the latter, Schurmeir had none.

A minor question was, whether—supposing Roberts to have owned the parcel originally—he had, or had not, under the statutes then in force in Minnesota, divested himself of such right by recording his town plot?

Mr. T. A. Hendricks, for the railroad company, plaintiff in error:

The land system of the United States was designed to provide, in advance, with mathematical precision, the ascertainment of boundaries. The purchaser takes by metes and bounds. These rules are settled, and accordingly the township line at the north, the section line at the west, and the meander-line on the remaining side—a line beginning and ending at posts, and running by courses, described between them—must constitute the boundary here. In no other way can the rules be conformed to. By the pretensions of the opposite counsel, the purchaser would pay for a little more than nine acres, and get but little less than twelve. The lines marked on the ground must thus control.*

But, admit that the land comes to the bank edge. This is the most the other side can pretend; for the pretension of

* Bates v. Railroad Company, 1 Black, 204; Walker v. Smith, 2 Pennsylvania State, 43; Younkin v. Cowan, 84 Id. 198; Hall v. Tanner, 4 Id. 244.

carrying the grant to the middle line of a vast river, is untenable in our country, even at common law,* and plainly in the face of the statute of May 17, 1796, and other statutes. What, then, is the bank of a river? It is decided in Pennsylvania,† to be "the continuous margin, where vegetation ceases." The *shore* is, on the other hand, decided to be "the pebbly, sandy, or rocky space between that and low water-mark." This island, when it was an island, and not bottom of the river, was four feet below the bank. When in the condition most favorable to the case of the other side, it was "sandy space," between *very* low water-mark and the bank; not bank, but shore.

In fact, however, it was not, rightly considered, even shore. In one condition of the river, it was river bottom; in another —the ordinary condition—an island in the river; and only in a third, and rare condition—"very low water"—did it approach even the character of shore.

We may add, that Roberts, by his dedication of the land for a landing, parted with his property, and that his grantee, Schurmeir, has no title in it, and cannot now restrain the railroad from entering on it.

Mr. Allis, contra:

1. The meander-lines are *not* boundaries. They are not even known to the laws or acts of Congress. The term "meander" is simply used to designate certain lines, run by the surveyors, along the windings of water-courses, bounding fractions, for the purpose of ascertaining and returning the quantity of land in such fractions. There is no provision in the acts of Congress for meandering a water-course, or running any line along its bank. But the *quantity* of land in a fraction must be returned; hence, alone, the surveyor runs lines along the bank.

* Carson *v.* Blazer, 2 Binney, 475; Bullock *v.* Wilson, 2 Porter (Alabama), 436; People *v.* Canal Appraisers, 33 New York, 461; McManus *v.* Carmichael, 3 Clark (Iowa), 1.

† McCullough *v.* Wainright, 2 Harris, 171; and see Storer *v.* Freeman, 6 Massachusetts, 435; and Lewen *v.* Smith, 7 Porter (Alabama), 428.

2. If the surveyor make an error in his return, as to the quantity of the land, or if the quantity is erroneously stated in the patent, this will not affect the grant. The grantee will take according to the *boundaries* of the land described.*

3. Whether the grant extends to the *medium filum* of the river, is a point not in the least necessary to be considered; though we believe it does. Most of the authorities which would deny this proposition, concede that the riparian owner takes to *low water-mark.*† That is all that we need maintain.

4. The record of the town-plot did not make a *dedication* of land intended for "streets, alleys, ways, commons, or other public uses," equivalent to a grant in fee, whatever it might do by a "donation or grant" marked on the plot. Even if the plot did so make it, the town was bound to hold it for the purpose specified—in this case a "landing" —and Schurmeir, if interested as a citizen, might file his bill.

Mr. Justice CLIFFORD delivered the opinion of the court.

Complainant alleged that he was the owner in fee; and in the actual possession of the real estate described in the bill of complaint, together with the stone warehouse thereon erected. As described, the premises are situated in the city of St. Paul, county of Ramsey, and State of Minnesota; and the allegation is, that the lot extends to, and adjoins the public street and levee which run along the left bank of the Mississippi River in front of that city; that the said street and levee constitute the public landing for all steamboats and other vessels bound to that port, and the place where all such vessels receive and discharge their freight and passengers; that the street, levee, and public landing, occupy the whole space between this lot and the bank of the river, in front of the same, and that he is the owner in fee of that

* Lindsey v. Hawes, 2 Black, 554.

† Dovaston v. Payne, 2 Smith's Leading Cases, 224-6.

whole space, subject to the public right to use and occupy the same as such street, levee, and public landing.

Based upon these preliminary allegations, the charge is, that the corporation respondents were then engaged, without his license or consent, in extending and constructing their railroad over and along the said public street, levee, and landing, in front of his premises, with the design and purpose of running their cars on the same for the transportation of freight and passengers; and the complainant alleged that the effect would be, if the design and purpose of the respondents should be carried out, that the said public street, levee, and landing, could not be occupied and used for the purposes for which they were constructed, and to which they were dedicated, and that his premises would be rendered useless and valueless.

Two defences were set up by the respondents in their answer.

First. They denied that the fee of the land described in the bill of complaint, as a public street and levee, or public landing, was ever in the complainant, or that he ever had any right, title, or interest in the land between his premises and the main channel of the river.

Secondly. They alleged that all the land between the premises of the complainant and the river in front, were part and parcel of the lands surveyed by the United States, and granted by the act of Congress of the 3d of March, 1857, to the Territory of Minnesota, and that they were the owners of the same in fee, as the grantees of the Territory and State, to aid in the construction of their railroad.

Defence of the other respondents is, that all the acts charged against them were performed by the direction and under the authority of the respondent corporation.

Prayer of the bill of complaint was, that the respondent might be restrained from extending and constructing their railroad over and along said public street, levee, or landing, and from obstructing and impeding the free use of the same by the public.

By consent of parties, it was subsequently ordered by the

court, that the cause be referred to a sole referee, to hear and determine all the issues in the pleadings, and that he should report his determination to the court. Such a report was subsequently made by the referee, and the record shows that the court, in pursuance of the same, enjoined the respondents as prayed in the bill of complaint, and ordered, adjudged, and decreed that the respondents should remove from the street, levee, and landing in front of the complainant's premises, all tracks, trestleworks, embankments, buildings, and obstructions of every kind erected or constructed thereon by them for railroad purposes.

Appeal was taken by the respondents from the decree, as rendered in the District Court for that county, to the Supreme Court of the State, where the decree was in all things affirmed, and the respondents removed the cause into this court, by a writ of error, sued out under the twenty-fifth section of the Judiciary Act.

1. Express finding of the referee was, that the premises in question were included in that part of section five, township twenty-eight north, in range twenty-two west of the fourth principal meridian, which is situated on the north side of the centre line of the Mississippi River. He also found that the survey of that part of section five was made by the deputy surveyor, October 27, 1847; that the field-notes of the survey were duly communicated to the surveyor-general, and that the latter officer, on the 15th of March following, duly approved the survey as made by the deputy surveyor. Same report also shows that a plat of that part of section five was duly prepared and certified by the surveyor-general, on the same day, and that it was duly transmitted to the land office of the district where the land was situated. By that plat it appears that the land, as surveyed, consisted of two separate parcels, called lots 1 and 2, in the report of the referee, exhibited in the record. Lot 1, the tract in question, is situated in the northwest corner of the section, and contains the quantity of land described in the official survey and plat. Particular description of lot 2 is unnecessary, as it is not in controversy in this case.

Opinion of the court.

Both of those lots were purchased by Lewis Roberts, and on the 24th of March, 1849, a patent, in due form of law, was issued to him, for the same, by the proper officers of the United States. Possessed of a full title to all the land described in the patent, the purchaser caused lot 1 to be surveyed and laid out into town blocks, lots, streets, &c., as a part of the town of St. Paul, and the finding of the referee is, that the plat, as recorded, describes the land as extending to the main channel of the river. Block 29, as exhibited on that plat, includes lots 11 and 12, described in the bill of complaint, and the report of the referee shows that they are a part of the triangular fraction of land situated in the northwest corner of section 5, as delineated on the official plat.

Claim of the complainant is to lots 11 and 12, in block 29, and the finding of the referee is, that he holds the same through certain mesne conveyances, from the original grantee under the patent.

Congress granted to the Territory of Minnesota, by the act of the 3d of March, 1857, for the purpose of aiding in the construction of certain railroads, every alternate section, designated by odd numbers, for six sections in width, on each side of the respective railroads therein mentioned, and their branches, and the respondents claim title to the premises described in the pleadings under that act of Congress, as the grantees of the State.*

Title claimed by the complainant, being of prior date to that set up by the respondents, will be first examined, because, if it be sustained as including the premises in controversy, an examination of the title of the respondents will not be necessary.

Since the town of St. Paul was organized under her city charter, passed March 4, 1854, the city government has exercised municipal authority and control over the entire parcel of land lying between the main channel of the river and

* 11 Stat. at Large, 195; State Session Laws, 1857, 70; Gen. Laws, 1858, 9; Session Laws, 1862, 226.

block twenty-nine, where the complainant's warehouse is situated. Claiming entire control over the premises, as a street, levee, or landing, the city authorities have established a grade for the same, and, long before any attempt was made by the respondents to controvert the title of the complainant, they had made large progress in the work of reducing the surface of the land to the established grade.

Appellants contend that the river is not a boundary in the official survey; that the tract, as surveyed, did not extend to the river, but that the survey stopped at the meander-posts and the described trees on the bank of the river. Accordingly, they insist that lot 1 did not extend to the river, but only to the points where the township and section lines intersect the left bank of the river, as shown by the meander-posts.

The finding of the referee also shows that the meander-line of lot 1 was run, in the official survey, along the left or north bank of a channel which then existed between that bank and a certain parcel of land in front of the same, afterwards designated as Island 11, but which was not mentioned in the field-notes of the official survey, nor delineated on the official plat.

Conceded fact is, that those field-notes constituted the foundation of the official plat, and that that plat was the only one in the local land office at the time the patent was issued under which the appellee claims. When the water in the river was at a medium height, there was a current in the channel, between what is called the island and the bank, where the meander-posts were located, but when the water was low, there was no current in that channel, and, when the water was very high in the river, the entire parcel of land, designated as the island, was completely inundated.

No mention is made of any such channel in the official survey, under which the patent was issued; but the deputy surveyor, under the instructions of the land office, on the 13th of March, 1856, made a new survey of the parcel of land lying between that channel and the main channel of the river, and the field-notes of the same were subsequently

approved by the surveyor-general. Duplicates of that survey were communicated to the General Land Office, and the finding of the referee shows that the plat exhibits the true relation which that tract bears to lot 1 in that section. Prior to that survey, however, the city of St. Paul had filled the channel, and reclaimed the land at the west end of the same, and extended the grade of the street and levee, or landing, entirely across the island to the main channel of the river. Besides, the uncontradicted fact is, that the landing for boats and vessels, touching at that port, was always on the river-side of the island, and the finding of the referee shows that the front wall of the complainant's warehouse is not more than four feet north of the southerly line of the lot on which it is erected.

Surveyors were directed by the act of Congress of the 20th of May, 1785, to divide the territory, ceded by individual States, into townships of six miles square, by lines running due north and south, and others crossing these at right angles, ... "unless where the boundaries of the tracts purchased from the Indians rendered the same impracticable."*

Congress preserved the same system also in the act of the 18th of May, 1796, in respect to the survey and sale of the lands northwest of the Ohio River, but the latter act recognizes two other necessary exceptions to the general rule.† Public lands therein described were required to be divided by north and south lines running according to the true meridian, and others crossing them by right angles, so as to form townships of six miles square, "unless where the line of the late Indian purchase, or of the tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render it impracticable." By the ninth section of that act, it is provided that all navigable rivers within the territory mentioned in that act, should be deemed to be, and remain, public highways, and that, in all cases where the opposite banks of any stream, not navigable, shall belong to different

* 1 Land Laws, 19.

† 1 Stat. at Large, 464.

persons, the stream and the bed thereof should become common to both.*

Provision was made by the act of February 11, 1805, that townships should be "subdivided into sections, by running straight lines from the mile corners, marked as therein required, to the opposite corresponding corners, and by marking on each of the said lines intermediate corners, as nearly as possible equidistant from the corners of the sections on the same." Corners thus marked in the surveys, are to be regarded as the proper corners of sections, and the provision is, that the corners of half and quarter sections, not actually run and marked on the surveys, shall be placed, as nearly as possible, equidistant from the two corners standing on the same line.† Boundary lines actually run and marked on the surveys returned, are made the proper boundary lines of the sections or subdivisions for which they were intended, and the second article of the second section provides, that the length of such lines, as returned, shall be held and considered as the true length thereof. Lines intended as boundaries, but which were not actually run and marked, must be ascertained by running straight lines from the established corners to the opposite corresponding corners; but where no such opposite corresponding corners have been, or can be fixed, the boundary lines are required to be ascertained by running from the established corners due north and south, or east and west, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.

Express decision of the Supreme Court of the State was, that the river, in this case, and not the meander-line, is the west boundary of the lot, and in that conclusion of the State court we entirely concur.‡

Meander-lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the

* 1 Stat. at Large, 468. † 2 Id. 313.

‡ Schurmeier v. The Railroad, 10 Minnesota, 82.

sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary.

Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream; but the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways. Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway.*

The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the centre of it, and he consequently holds that the fee passes to that extent. Decided cases of the highest authority, affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country. Except in one or two States, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land. Substantially the same rules

* 3 Commentaries, 11th ed. 427.

are adopted by Congress as applied to streams not navigable; but many acts of Congress have provided that all navigable rivers or streams in the territory of the United States, offered for sale, should be deemed to be, and remain public highways.*

Irrespective of the acts of Congress, it should be remarked, that navigable waters, not affected by the ebb and flow of the tide, such as the great lakes, and the Mississippi River, were unknown to courts and jurists, when the rules of the common law were ordained; and even when the learned commentaries were written, to which reference is made, it was still the settled doctrine of this court, that the admiralty had no jurisdiction except where the tide ebbed and flowed.†

Extended discussion of that topic, however, is unnecessary, as the court decides to place the decision, in this case, upon the several acts of Congress making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys. Such a reservation, in the acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field-notes, or in the official plat or patent, inconsistent with that explicit reservation. Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words navigable, and not navigable, in that sense, as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide-waters, and in which there were no salt-water streams.

Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, in making a distinction

* 1 Stat. at Large, 491; 2 Id. 235, 279, 642, 666, 708, 747; 3 Id. 349.

† The Jefferson, 10 Wheaton, 428; Genesee Chief, 12 Howard, 456; Hine v. Trevor, 4 Wallace, 565.

between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways.

Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide.*

Argument is scarcely necessary to show, in view of the definite regulations of Congress upon the subject of the survey and sale of the public lands, that the second survey of the space between block twenty-nine and the main channel of the river, cannot affect the title of the complainant as acquired from the United States under the antecedent official survey and sale.†

Attempt is also made to justify the acts of the respondents, as grantees of the State, upon the ground, that the complainant, in dedicating the premises to the public as a street, levee, and landing, parted with all his title to the same, and that the entire title vested in fee in the State. Respondents rely for that purpose upon the statute of the Territory of Wisconsin, which was then in force in the Territory of Minnesota.‡

Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defence to the suit, because it is nevertheless true, that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party in making the dedication. They could not, nor could the State, convey to the respondents any right to disregard the trust, or to appropriate the prem-

* Dutton v. Strong, 1 Black, 23.

† Lindsey v. Hawes, 2 Black, 554; Bates v. Railroad Company, 1 Id. 204; Brown v. Clements, 3 Howard, 650.

‡ Statutes of Wisconsin Territory, 159.

ises to any purpose which would render valueless the adjoining real estate of the complainant.

Considered in any point of view, our conclusion is, that the decree of the State court was correct; and the decision in this case also disposes of the appeal brought here by the same appellants, from a decree rendered by the Circuit Court of the United States for the District of Minnesota, in favor of George D. Humphreys and others, which was a bill in equity against the same respondent corporation. The appeal in that case depends substantially upon the same facts, and must be disposed of in the same way. Both decrees are

AFFIRMED.

MEAD v. BALLARD.

1. A grant of land, "said land being conveyed *upon the express understanding and condition*" that a certain institute of learning then incorporated "shall be *permanently located* upon said lands," between the date of the deed and the same day in the succeeding year, is a grant upon condition, a condition subsequent.
2. Such permanent location was made and the condition was thus fulfilled when the trustees passed a resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation. And this, notwithstanding that the building erected in pursuance of the resolution was afterwards destroyed by fire, and the institute subsequently erected on another piece of land.

ERROR to the Circuit Court for Wisconsin.

Mead brought ejectment in the court below against Ballard to recover certain land which the ancestor of him (Mead) had conveyed for a full consideration, on the 7th September, 1847, to Amos Lawrence, of Boston, in fee. The deed contained the usual covenants of warranty, and also a clause expressed in these words:

"Said land being conveyed upon the express understanding and *condition* that the Lawrence Institute of Wisconsin, chartered by the legislature of said Territory, *shall be permanently*

Argument for the heir.

located upon said lands, and *on failure of such location being made on or before the 7th day of September*, 1848, and on repayment of the purchase-money without interest, the said land shall revert to and become the property of said grantors."

On the 9th of August, 1848, the board of trustees of the Lawrence Institute passed a resolution locating the Institute on the land described in the deed. Contracts were made for the necessary buildings, which were commenced immediately, and they were finished and the institution in full operation by November, 1849. These buildings cost about $8000, but were burned down in the year 1857, *and never rebuilt.* It was also said that in 1853, a larger building, called the University, was erected on an *adjoining* tract.

In 1851, Lawrence sold to one Wright part of the tract which had been conveyed, as above stated, to him; and in 1853 Wright sold it to Ballard. Mead now, in 1865, being sole heir of the original grantor, and alleging that the facts constituted an infraction of the condition on which the land had been conveyed, made a tender, through an agent, to Lawrence, of the amount originally paid by Lawrence for the tract—depositing the money in Boston "where he could get it at any time he chooses"—and brought this ejectment.

The jury, under charge of the court, that if the Institute was located on the tract on or before the 7th of September, 1848, and if the directors then proceeded to erect a building which was used by it in its business, the plaintiff could not claim a forfeiture, found for the defendant; and the case was brought here on exceptions by the plaintiff.

Mr. Palmer, for the plaintiff in error:

1. The conveyance made by Mead to Lawrence, was made upon a *condition*, a condition subsequent. As a consequence, the estate in the lands described therein, vested in Lawrence, on the execution and delivery of the deed, September 7, 1847, subject, however, to be defeated by the failure or neglect of the grantee to perform the conditions.

2. The estate was so defeated. There is no reason to

doubt that the grantor (Mead) intended by the language of his deed—"*permanently* located"—to secure a fixed and continued location of the principal buildings of the Institute upon the lands conveyed. Nor could he have chosen words more apt to express his purpose.

The word "permanent" is derived from the Latin *per*, an expression which in composition is an intensitive, and here means thoroughly, or completely; and the Latin *manens*, whose signification is "remaining," or "lasting." Permanent means, therefore, and is so defined by Noah Webster, "continuing in the same state without any change that destroys the form or nature of the thing," . . "with long continuance, durably, in a fixed state or place." And permanently *locating* a building, means, both etymologically and within the plain meaning of this deed,—not choosing a spot for a building—such choice is implied in the acceptance of the lot—but permanently *placing* the building on that spot. Of what value to a founder's pride would it be to select the place and then abandon it? Such a location would be what the law calls "illusory;" a mockery, and nothing else. The grantor associated his real estate, a symbol of perpetuity, with himself, and meant to identify *his estate* with a seat of learning, though it bore not his name. The trustees accept, in form, from him, that real estate, his gift, subject to an express condition; and when the gift is well passed to them, they pitch away the condition and retain the gift simply. If there is a condition in the case at all, it cannot be disposed of in this way.

The University was not permanently located; a temporary structure was erected in 1848, which was burned in 1857. The main building, or University proper, was commenced in 1853, on another tract. Such an abandonment of the premises conveyed as a site for the University, and a "permanent" location of it upon the new tract, was a violation of this condition of the deed with respect to the permanency of the location.

3. The condition contained in the deed having been violated, the contingency arose in which the land conveyed

"reverted to and became the property of the grantor, on repayment of the purchase-money." The plaintiff, sole heir at law of the grantor, caused the purchase-money to be tendered to Lawrence, and in a few months afterwards brought this action.

Mr. G. W. Lakin, contra:

1. The words hardly make a *condition*. The language of the deed being dictated by the grantor must be taken strictly against him, especially when the language is set up to destroy an estate granted. The technical language of a condition is, "provided, however, that this conveyance is upon the condition," &c. But—

2. The condition in the deed was and has been performed and fulfilled. The thing to be done was to locate the Lawrence Institute on the tract of land, on or before the 7th day of September, 1848. The word "locate" is peculiarly an American word. On the meaning of any such word, Noah Webster is the highest authority. Now, to locate, is defined by him, "to designate or determine the place of." It does not mean to erect and forever keep erected; which is its meaning as assumed by opposing counsel. The board of trustees did designate and determine the place of the Lawrence Institute. The purchaser could not be held to look beyond the fact of an actual location; certainly not beyond the fact of an actual erection of the Institute. He was not bound to look through all coming time to ascertain if the elements, legislation, or some convulsion of nature should extinguish and destroy it. The destruction of the main building in 1857, by fire, therefore, and its subsequent erection on the tract adjoining, could not work a forfeiture of the condition, or a reversion of the title to the plaintiff. At any rate, such an event could not affect the title of the defendant, who had purchased in good faith, and who had improved and occupied years before the event happened.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff, who sues as heir-at-law of the grantors, main-

tains that the condition contained in the deed from Mead to Lawrence, is a condition subsequent which has not been performed, and having tendered the money received by them, he now claims the right to recover the land.

It must be conceded that the language of the deed amounts to a condition subsequent, and as no point was made in the trial as to the sufficiency of the tender, the only question before us is whether the condition was performed.

That condition was, that a permanent location of the Institute on the land should be made between the date of the deed and the same day of the succeeding year. The location, then, whatever may have been its character, was something which could have been done and completed within one year. If it was done within that time the plaintiff's right of reverter was gone. If it was not done within the year, he could refund the money and recover the land. His right, on whatever it depended, must have been complete on the 7th day of September, 1848, for within that time the condition was to be performed.

The thing to be done was the location of the Institute. Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers of the institution were to determine, in good faith, the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the Institute within the true construction of the contract.

Counsel for the plaintiff attach to the word "permanent," in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land

forever, or for a very indefinite time. This could not have been the intention of the parties.

We are of opinion that the testimony shows, in any view that can be taken of it, that the condition was fully complied with and performed, and with it passed all right of reversion to the grantor or his heirs.

The rulings of the Circuit Court to which exceptions were taken were in conformity to these views, and its

JUDGMENT IS AFFIRMED.

JACOBS v. BAKER.

1. *Semble* that an improvement in the plan of constructing a jail, is not a subject of patent within the Patent Acts of 1836 or 1842.
2. Jacobs was not the first inventor of the improvements patented to him in 1859 and 1860, for improvements in the construction of jails.

JACOBS filed a bill in the Circuit Court for Southern Ohio against Baker, seeking relief for the infringement of four separate patents, which had been granted to him, Jacobs, *for improvements in the construction of prisons.* The bill set forth the different patents.

The first, dated January 7th, 1859, was for an improvement in the construction of prisons, which the complainant set forth in his specification with very numerous plates and designs. The claim concluded thus: "What I claim as my invention, and desire to secure by letters patent, is a secret passage, or guard-chamber, around the outside of an iron-plate jail, and between said jail and a surrounding inclosure, constructed and arranged, substantially as described, for the purpose set forth." [The purpose was to allow the keeper to oversee and overhear the prisoners, without their being conscious of his presence.]

The next patent was dated 20th December, 1859, and purported to be for an "improvement in iron-plate jails." The claim was for "the improved iron walls for the same, con-

sisting of the following parts, arranged and united as set forth, to wit: the entire wall plates (A) having their edges closely abutting, the joint plates (e) united to and uniting the plate A, by rivets (i), which have their riveted ends inwards, and countersunk to the depth of the thickness of the plate A, in the manner and for the purposes herein set forth." This specification was also accompanied by numerous plates.

The third patent, dated 21st February, 1860, was for an "improvement in joining plates of metal," and was stated to be specially applicable to prisons. The claim was for "the construction of the joint, made by means of the closely abutting plates (A A), and the flat and semicylindrical plates B B, and rivets (c), substantially in the manner and for the purpose set forth." This, too, had numerous drawings.

The fourth patent, dated 24th July, 1860, was for an "improvement in iron prisons." The claim was for "constructing and arranging plate-iron cells in jails, separately from each other, with vertical spaces (e), between the cells, upon the same level, and horizontal spaces, between cells, arranged one above another, substantially as and for the purpose described." This was also profusely illustrated by drawings.

The bill, which averred that the complainant was the original and first inventor of all these improvements, and that the defendant was an infringer of his patents, asked that the defendant might answer the bill under oath, and be compelled to state how extensively, and where he had sold the improvements patented, and to describe his modes of construction, &c.

The defendant did answer on oath, denying that the improvements were original with the complainant or new, but averring that they had been long in use; and setting out various jails in different parts of the country where they had been used in 1855, 1857, 1858, &c., all before the date of the patents relied on.

A large amount of testimony was taken on both sides, upon which the court below, considering that the defendant had established his case, dismissed the bill with costs. The case was now here on an appeal by the patentee.

Mr. Fisher, for the appellant, assuming that the matters embraced by the patents were the proper subjects of patents within the Patent Acts, went into an elaborate examination of the testimony to show that the inventions were original with the patentee.

No opposing counsel.

Mr. Justice GRIER delivered the opinion of the court.

The patent act of 1836* enumerated the discoveries or inventions for which patents shall be issued, and describes them as "any new and useful art, machine, manufacture, or composition of matter."

We have been at some loss to discover under which category to class the four patents which are the subjects of this bill. The complainant alleges that he has invented a new and useful improvement in the construction of *jails*. Now a jail can hardly come under the denomination of "a machine;" nor, though made by hands, can it well be classed with "manufactures;" nor, although compounded of matter, can it be termed a "composition of matter," in the meaning of the patent act. "But if the subject-matter be neither a machine nor a manufacture, nor a composition of matter, then," says an author on the subject of patents,† "it *must* be an art, for there can be no valid patent except it be for *a thing made*, or for the art or *process of making* a thing." Now, without attempting to define the term "art" with logical accuracy, we take as examples of it, some things which, in their concrete form, exhibit what we all concede to come within a correct definition, such as the art of printing, that of telegraphy, or that of photography. The art of tanning leather might also come within the category, because it requires various processes and manipulations. The difficulty still exists, however, under which category of the patent act an improvement in the construction of jails is to be classed, or whether under any.

The patent act of 1842‡ gives a copyright for "new and

* § 6, 5 Stat. at Large, 119.

† Curtis on Patents, 91.

‡ § 3, 5 Stat. at Large, 544.

original designs for manufacture, whether of metal or other material, for bust, statue, &c., or any new and original shape or configuration of any article of manufacture, to any inventor who shall desire to obtain an exclusive property, to make, use, and vend the same, or *copies* of the same."

Now, although the complainant might contend (as one would suppose from the immense number of plans, designs, and drawings with which the record in the case has been incumbered) that his patent could be supported under this act, yet still the difficulty remains whether the erection of a jail can be treated as the infringement of a *copyright.*

But waiving all these difficulties as hypercritical, and assuming the correctness of the positions taken, that whatever is neither a machine, nor a manufacture, nor a composition of matter, must (*ex necessitate*) be "an art;" that a jail is a thing "made;" and that the patent is for the "*process* of making it," let us examine the case as presented by the bill and answer.

The bill relies upon four several patents which it sets forth. They are dated January 7th and 20th December, 1859; 21st February and 24th July, 1860. It would seem from the quick succession of these patents and before the plans for building jails which they severally suggested could well be put practically into operation, and before any inquiry was made as to how other persons constructed jails, that as a new idea came into the complainant's mind, he immediately proceeded to the Patent Office to get it patented.

It is not necessary to the decision of this case to examine whether all or any of the suggestions made by the complainant were proper subjects of patent. The bill presents a number of interrogatories to the defendant and requires him to answer them under oath. The answer of the defendant denies that the complainant was the original and first inventor of the several inventions claimed, or of any of them, and avers that the devices described in the complainant's patents were well known, and in use prior to the pretended invention of them by the complainant. And it enumerates many persons who had used the devices before the complainant.

Statement of the case.

The record presents no question of law as to the construction of these patents. The only issues were of fact. It would be a tedious as well as an unprofitable task to attempt to vindicate the correctness of our decision of this case by quoting the testimony and examining the volume of plates annexed to it. The decision could never be a precedent in any other case. It is enough to say that we see no reason to doubt the correctness of the decision of the Circuit Court on the issues made, or the pleadings.

DECREE AFFIRMED.

DRURY v. CROSS.

1. A sale, far below value, of a railroad, with its franchises, rolling stock, &c., under a decree of foreclosure, set aside as fraudulent against creditors; the sale having been made under a scheme between the directors of the road and the purchasers, by which the directors escaped liability on indorsements which they had made for the railroad company. And the purchasers held to be trustees to the creditors complainant, for the full value of the property purchased, less a sum which the purchasers had actually paid for a large lien claim, presented as for its apparent amount, but which they had bought at a large discount. Interest on the balance, from the day of purchase to the day of final decree in the suit, to be added.
2. But because the full value of the property sold was not shown with sufficient certainty, the case was sent back for ascertainment of it by a master.

APPEAL from the Circuit Court for Wisconsin.

The case was this: Bailey & Co., of Liverpool, England, held notes against the Milwaukee and Superior Railroad Company, indorsed by four of its directors, for about $21,000 (the price of iron furnished to lay the road), and as collateral security for payment, $42,000 in mortgage bonds of the road. Two hundred and eighty thousand dollars in similar bonds, but which had never been *issued*, were sealed up and deposited with M. K. Jesup & Co., *not to be issued* until the debt to Bailey & Co. was paid, and twenty-seven miles of the road were built. The company was managed by a board of seven directors; of whom four made a quorum.

The company having made about five miles of the road, became thoroughly insolvent, and abandoned their enterprise. Bailey & Co. being unpaid, and not being willing to trust to and proceed on their mortgage, brought actions against the four directors on their indorsement. These, desirous to throw the debt on the company, where it belonged, procured, at their own expense and risk, a suit to be commenced to foreclose the mortgage, so that they could make their debt out of the collaterals in their hands. In this suit certain bonds issued to the city of Milwaukee, and the $42,000 of bonds held by Bailey & Co., were spoken of; but no mention was made of the $280,000 of bonds deposited with Jesup & Co., and no relief asked in relation to them. On the 19th of March, 1859, the bill was taken as confessed, decree rendered, and the case referred to the master to compute and report the amount that was due.

Prior to the decree, in consequence of negotiations between the directors and Cross, Luddington & Scott (Cross & Co.), an arrangement was made by which these persons were to purchase the claim of Bailey, and protect the directors from their indorsement. The directors, on their part, were to aid Cross & Co. to acquire the entire property of the road.

In furtherance of this plan, the $280,000 of bonds in the hands of Jesup & Co. were delivered, by resolution of the board of directors, to Bailey & Co., as additional security for their claim. Bailey & Co. did not ask for further security, and refused, at first, to receive these bonds, and, in fact, did not receive them until they had sold their claim, with their collaterals, to Cross & Co. This was after the decree in the foreclosure suit. Cross & Co. having thus got possession of $322,000 in bonds, transferred by Bailey & Co., as collaterals, in order, as they said, to become the absolute owners of them, sold them, with consent of the railroad corporation, at the Exchange in Milwaukee, on five days' notice; bought them for a small sum of money; produced them before the master, who allowed them as a lien on the road, and the final decree in the foreclosure suit was rendered upon the said $322,000 bonds, and no others.

The sum paid by Cross & Co. to Bailey & Co., for all the judgments obtained, was $13,380.20.

Under the decree of foreclosure, the entire railroad, its franchises, rolling stock (two locomotives and tenders, with ten platform cars) and fixtures, were sold, in August, 1859, to Cross & Co., for $20,100. The iron tracks, which were now torn up, some evidence showed had been sold for $22,500. The locomotives (little used) had cost $18,000; the cars about $5000. The company, it was said, had paid between $15,000 and $20,000 for their right of way. There were also railroad chairs, spikes, ties, some fences, &c.; the value not being exactly shown.

In this state of things, Drury & Page, having obtained judgment for $21,634 against the railroad company for locomotives sold to it, filed a bill in chancery in the court below against the company, Cross and his co-purchasers, alleging that the sale was fraudulent, and seeking to reach the franchises and property of the company sold to Cross & Co. under the decree of foreclosure. The court below dismissed the bill as to Cross and his co-purchasers; and from this decree of dismissal the present appeal came.

Mr. M. H. Carpenter, for the appellants, contended, that it was plain that the directors had agreed to sacrifice, and did sacrifice, the entire property of the company, which it was their duty as trustees to protect, to secure the personal advantage of discharge from their indorsements. That the case was the same in principle as *James* v. *Railroad Company*,* in which the court, setting aside a sale, animadverted with severity on the conduct of the parties concerned, and said that the notice of sale "was calculated to destroy all competition among the bidders, and, indeed, to exclude from the purchase every one except those engaged in the perpetration of the fraud." Upon this assumption the counsel argued that Cross and his co-purchasers should be charged with the full value of the property they received, and con-

* 6 Wallace, 752.

verted to their own use, fixed by him on the evidence (not very exact), at $66,100.00
Less what they paid, ... 13,380.20

$52,719.80

Mr. Palmer, *contra*, argued that the complainants had not acquired any lien upon the property of the railroad company, or upon the bonds deposited with Jesup & Co., and that by making the transfer to Bailey & Co. of the $280,000 bonds which had been deposited with Jesup & Co., the directors had only given a preference to a meritorious creditor; a preference which it had been repeatedly determined by this court was lawful.*

Mr. Justice DAVIS delivered the opinion of the court.

The transaction which this case discloses cannot be sustained by a court of equity. The conduct of the directors of this railroad corporation was very discreditable, and without authority of law. It was their duty to administer the important matters committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust. To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management, with absolute fidelity to both creditors and stockholders, they, nevertheless, acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed. If Bailey & Co. had sold iron to build the road, so had the Boston association sold locomotives to run it. It is not easy to see why the corporation should exhaust its effects to pay one, and leave the other unpaid. But, it is said, the directors, being unable to pay both, had the right to choose between them. We do not deny that a debtor has a legal right to prefer one creditor over another, when the transaction is *bonâ fide;* but

* See Tompkins v. Wheeler, 16 Peters, 106.

this is, in no just sense, a case of preference between creditors. If the law permits the debtor, in failing circumstances, to make choice of the persons he will pay, it denies him the right, in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result.

That the plan adopted by the directors of this railroad to dispose of its property to Cross & Co. was a fraudulent contrivance, and necessarily, if executed, accomplished a fraudulent result, is too plain for controversy. At the time this scheme was initiated, there were only five miles of track laid, the company hopelessly insolvent, and the enterprise abandoned. In this condition of things, the directors were sued on their indorsement, and, as was natural, manifested an anxiety to have the property of the company pay the debt for which they were liable. But Bailey & Co. preferred not to enforce their mortgage lien, and only consented to allow it to be done, on being indemnified against the risk and expense of the suit. The directors, in furnishing them this indemnity, in order to procure the enforcement of the mortgage lien to the extent of $42,000, which in their hands was a just debt against the company, were guilty of no wrong. But the departure from right conduct, on their part, commenced at this point. Notwithstanding they had the control of the foreclosure suit, they were not content to let it proceed to decree and sale without they were, *in advance*, relieved of personal responsibility. Bailey & Co. would not release them, and they endeavored to find some person who would purchase the Bailey claim, with its collaterals, and discharge them from liability on their notes. This would have been well enough, if the scheme had embraced only the $42,000 bonds held as collaterals, which the company justly owed, and the foreclosure suit was brought to enforce. But the scheme went much further; for these directors, who controlled the corporation, in their selfish desire to save themselves at the expense of their own reputation and the rights of creditors, were willing to use the

means at their command to swell the indebtedness of the road beyond its true amount, in order to aid more effectually Cross and his associates to acquire all the property of the company.

If Cross & Co. had been satisfied with the transfer of the $42,000 bonds, which constituted the true indebtedness against the road, in the hands of Bailey & Co., the transaction on their part would have been free from censure; but the certain attainment of the object they had in view required more bonds. It was very clear that bidders might appear, if the road was to be sold for no more than the face of these bonds, while they would be deterred from attending a sale where the sum to be made was over $300,000. To bring the decree, therefore, up to a point at which competition would be silenced, it became necessary to use the bonds in the hands of Jesup & Co. Two hundred and eighty thousand dollars in the bonds of an insolvent corporation—constituting no indebtedness against it—are thrust, unasked, into the hands of creditors, for the ostensible purpose of furnishing them additional security, when, *at the time*, they were negotiating a sale of the debt to be secured for $7000 less than its face. But the transfer to Bailey & Co. was a mere pretence. To preserve a semblance of fairness in the business, the bonds had to come through Bailey & Co., but the real purpose was not to help them, but to aid Cross and his associates to absorb the whole road—and this these directors were willing to do—when the debt they were struggling to escape could be paid for $13,380.20, and the very iron in the road-bed, for which the debt was incurred, was worth over $20,000.

It is claimed that the sale at the Milwaukee Exchange, assented to by the corporation, conferred rights on the purchasers of the bonds which cannot be successfully attacked; but this claim is based on the idea that the sale was for an honest purpose, when, in fact, it was only part of a previously concerted plan to accomplish a fraudulent purpose. The ceremony of this sale was a cheap way of showing honesty and fairness, for it was very evident that an adver-

tisement to sell a large amount of the bonds (having no market value) of an insolvent and abandoned railroad corporation would never attract the attention of capitalists.

The scheme to acquire the property of this corporation was, in its inception, fraudulent, and every step in the progress of its execution was necessarily stamped with the same character. There is nothing in this record to mitigate the conduct of the defendants, who purchased the Milwaukee and Superior Railroad. They knew the road was abandoned, the company insolvent, the complainants unpaid for property then in the possession of the corporation, and yet they combine with timid and unfaithful trustees to get not only *this*, but all the property of the corporation, and adopted a plan to carry out their project, which resulted in raising the decree to an extent that would necessarily prevent all fair competition. The fruits of such an adventure cannot be enjoyed by the parties concerned in it.

There are other features in this case which provoke comments, but we forbear to make them.

Cross, Luddington, and Scott purchased the entire railroad, locomotives, cars, and franchises of the company, for about $20,000. Subsequent to the sale, they stripped the road-bed of iron, ties, spikes, and chairs, which, with the locomotives, cars, and fencing, they sold to various parties, and realized from the sales a large sum of money; but how much, the evidence is so singularly loose that we are unable to tell. On account of the want of certainty on this point, the case will have to be sent back, and referred to a master to take proofs, who will also ascertain and report the value (if there be any) of the franchises of the company which Cross & Co. still retain.

Cross, Luddington, and Scott must be held liable as trustees to the complainants for the full value of the property they purchased on the sale of the road, after deducting the amount due at the day of sale on the Bailey judgments against the directors, which amount they will be allowed to retain.

They must also be charged with interest on the balance found due the complainants, from the day of the sale to the day of the final decree in this suit.

THE DECREE of the Circuit Court is REVERSED, and the cause remanded, with directions to proceed in CONFORMITY WITH THIS OPINION.

EDMONSON *v.* BLOOMSHIRE.

1. If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed, although neither party ask it.
2. An appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable, is no longer a valid appeal or writ.
3. Although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal.
4. Such vitality cannot be restored by an order of the Circuit Court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one.

APPEAL from the Circuit Court for the Southern District of Ohio; the case being thus:

The Judiciary Act provides that final decrees in a circuit court may be re-examined, reversed, or affirmed here "upon a writ of error whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party."

It further enacts that "writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be a *feme covert*, &c., then within five years as aforesaid, exclusive of the time of such disability."

Statement of the case.

By an amendatory act, appeals in cases of equity are allowed "subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error."

With these provisions of law in force, John Edmonson, Littleton Waddell and Elizabeth, his wife, filed a bill in 1854 in the court below, against Bloomshire and others, to compel a release of title to certain lands, and on the 16th July, 1859, the bill was finally dismissed. On the 26th May "an appeal to the Supreme Court of the United States was allowed," and the appellants ordered to give bond in $1000. No further step was taken in the case till November 14, 1865, when a petition was filed in the Circuit Court, reciting the decree, and the allowance (May 26, 1860) of the appeal, and setting forth the death of the plaintiff Edmonson, intestate, on the 30th June, 1862, leaving a part of the petitioners his only heirs-at-law; and that, on the 20th June, 1864, the plaintiff Elizabeth Waddell also died intestate, leaving the other petitioners her only heirs-at-law, and that the interest of said intestates had descended to said petitioners as their respective heirs-at-law; and further setting forth, that no appeal-bond had been given under said order allowing the appeal. The prayer of the petition was that the petitioners be allowed "to become parties to the appeal, and to perfect the same by now entering into bond for the appeal."

Thereupon, on the same 14th November, 1865, this entry was made by the court:

"WADDELL, EDMONSON *et al.*,
v.
BLOOMSHIRE *et al.*
} 426.—*Petition to perfect appeal.*

"And now come the said petitioners, and the court being satisfied that the facts set forth in said petition are true, and that the prayer thereof ought to be granted, do order that said petitioners [naming the heirs of Edmonson], be admitted as parties plaintiff, in the place of said John Edmonson, deceased; and that the said [naming the heirs of Mrs. Waddell], be admitted as parties plaintiff in the place of the said Elizabeth Waddell, deceased; and that said petitioners have leave to perfect said

appeal *so allowed at the June Term*, 1859, of this court, by giving bond in the sum of $1000, as therein provided."

An appeal-bond was accordingly filed with, and approved by, the clerk, November 22, 1865. A citation (duly served) was issued on the 8th December, 1865, reciting *the allowance of an appeal at the October Term*, 1865, of the court, and citing the appellees to appear "at the next term of the Supreme Court, to be holden on the first Monday of December next." The transcript was filed here by the appellants for the first time on the 3d of January, 1866.

The case having been fully argued on the merits *by Messrs. Stanbery and Baldwin, for the appellants, and by Mr. J. W. Robinson, by brief, contra*, it was suggested from the bench that doubts were entertained by it as to the jurisdiction of the court over the case; the ground of the doubt, as the reporter understood it, being, that while the record showed that the only appeal asked for or allowed, was that of May 26th, 1860, the transcript was not filed during the term next succeeding the allowance of the appeal, nor till January, 1866; and thus that while the appeal had been taken in time the record had not been filed here in time to save it.

Mr. Stanbery now spoke in support of the jurisdiction:

The objection to the regularity of the appeal, he contended, comes too late, and had not been made by counsel. The case had been pending in this court more than three years. It had been fully argued on the merits by both parties. No motion had at any time been made by the appellees to dismiss it for any irregularity. The practice he believed to have been uniform to require a motion to dismiss before the case proceeds to a hearing.*

The appeal initiated in 1860 was not perfected until the order of November 14, 1865, when the bond was given. Till that last date there was, in fact, no appeal which required the transcript to be filed. When the appeal was allowed, all that remained to be done was to perfect the appeal so taken

* Mandeville v. Riggs, 2 Peters, 490; Brooks v. Norris, 11 Howard, 204.

by giving bond and filing the transcript in this court, which might be done by order of court after expiration of five years. In *The Dos Hermanos** it is said:

"It appears that the appeal was prayed for within the five years, and was actually allowed by the court within that period. It is true that the security required by law was not given until after the lapse of the five years, and under such circumstances the court might have disallowed the appeal and refused the security. But, as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal."

This is our case.

If this is not so, a new appeal may be regarded as having been taken by the proceedings of November, 1865. The citation recites them as being the allowance of an appeal.

If any doubt was entertained by the court as to the efficiency of the appeal, because more than five years elapsed after the decree before the appeal-bond was given and transcript filed in this court, it is to be observed that Mrs. Waddell, the party entitled to an appeal, was under coverture at the date of the decree, and at the time of her death, June 20, 1864. The appeal was saved as to her heirs. Moreover, her interest was so connected with that of her coplaintiff, Edmonson, that it is also saved as to him or his heirs.†

Mr. Justice MILLER delivered the opinion of the court.

In the cases of *Villabolos* v. *United States*, and *United States* v. *Curry*, decided at the December Term, 1847, and especially in the latter case, it was held, on full consideration, that whether a case was attempted to be brought to this court by writ of error, or appeal, the record must be filed before the end of the term next succeeding the issue of the writ or the allowance of the appeal, or the court had no jurisdiction of

* 10 Wheaton, 306.

† Owings v. Kincannon, 7 Peters, 399; Williams v. Bank of the United States, 11 Wheaton, 414; Meese v. Keefe, 10 Ohio, 362.

the case. This was repeated in the *Steamer Virginia* v. *West*,* *Mesa* v. *United States*,† and *United States* v. *Gomez*.‡

In *Castro* v. *United States*,§ the same question was raised. The importance of the case, together with other considerations, induced the court to consider the matter again at some length. Accordingly, the present Chief Justice delivered an opinion, in the course of which the former cases are considered and the ground of the rule distinctly stated.

Other cases followed that, and in *Mussina* v. *Cavazos*, decided at the last term, the whole doctrine is again reviewed, and the rule placed distinctly on the ground that this court has no jurisdiction of the case unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court; that the writ of error, like all other common law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable; that the act of 1803, which first allowed appeals to this court, declared that they should be subject to the same rules, regulations, and restrictions, as are prescribed in law, in writs of error. These principles have received the unanimous approval of this court, and have been acted upon in a large number of cases not reported, besides several reported cases not here mentioned. And the court has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court, we cannot do otherwise.

In the case of *United States* v. *Curry*, Chief Justice Taney, answering the objection that the rule was extremely technical, replied, that nothing could be treated by this court as merely technical, and for that reason be disregarded, which

* 19 Howard, 182.
† 2 Black, 721.
‡ 1 Wallace, 690.
§ 3 Wallace, 46.

was prescribed by Congress as the mode of exercising the court's appellate jurisdiction. We make the same observation now, and add, that it is better, if the rule is deemed unwise or inconvenient, to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century.

We are of opinion that the present case falls within the principle of these decisions. The only appeal that this record shows to have been either asked for or allowed, was that of May 26, 1860. The transcript was not filed during the term next succeeding the allowance of this appeal, nor until January, 1866.

Two grounds are assigned as taking the case out of the rule we have stated.

1. It is said that the appeal of 1860 was not perfected until the bond was given under the order of November 14, 1865, and that until this was done there was in fact no appeal which required the transcript to be filed.

The answer to this is, that the prayer for the appeal, and the order allowing it, constituted a valid appeal. The bond was not essential to it. It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted the appellant to give bond in this court.* In the case of *Seymour* v. *Freer*,† the Chief Justice says, that if, through mistake or accident, no bond or a defective bond had been filed, this court would not dismiss the appeal, but would permit a bond to be given here. And in all cases where the government is appellant, no bond is required. It is not, therefore, an indispensable part of an appeal that a bond should be filed; and the appeal in this case must be held as taken on the 26th day of May, 1860.

It is insisted that this view is in conflict with the case of *The Dos Hermanos*.‡ We do not think so. While the argument of counsel on the merits in that case is fully re-

* Ex parte Milwaukee Railroad Company, 5 Wallace, 188.
† 5 Wallace, 822. ‡ 10 Wheaton, 306.

ported, we have nothing from them on the motion to dismiss. The opinion of the court states that the question made was whether the appeal was in due time, and this is answered by saying, it was prayed and allowed within five years from the date of the decree. The appeal was, therefore, taken in due time. It is further said, that the fact that the bond was given after the expiration of the five years, did not vitiate the appeal. This is in full accord with what we have just stated. The bond may be given with effect at any time while the appeal is alive. There is no question made in the present case about the appeal being taken within time. It was taken in time. But the record was not filed in the court in time to save the appeal; and that question was not made or thought of in the Dos Hermanos case. It is perfectly consistent with all that we know of that case, and, indeed, probable, that, though the taking of the appeal was delayed until near the expiration of the five years, and filing the bond until after that period, the transcript was filed at the next term after the appeal was taken.

2. It is next insisted that a new appeal was taken by the proceedings of the 14th November, 1865.

This, however, is in direct contradiction of the record. The petition of appellants, after reciting the former decree and the order allowing the appeal of May 26, 1860, and the death of some of the plaintiffs in the suit, and that no appeal-bond had been given, concludes as follows: "Your petitioners now appear, and pray your honors to allow them to become parties to said appeal, and to perfect the same by now entering into a bond for the appeal." And the order made is, "that said petitioners have leave to perfect said appeal, so allowed at the June Term, 1859, of this court, by giving bond, &c." The only appeal referred to in the petition, or the order of the court, is the appeal allowed May, 1860, and no language is used in either which refers to a new appeal, or which is consistent with such an idea.

It is true that the citation speaks of the allowance of the appeal as obtained at the October Term, 1865, but this recital does not prove that an appeal was then allowed, when it

stands unsupported by the record. Still less can it be permitted to contradict what the record states to have been done on that subject, at that time.

In the case of *United States* v. *Curry*, the same facts almost precisely were relied on as constituting a second appeal, that exist in this case, including the misrecital in the citation. But the court says, "that after very carefully considering the order, no just construction of its language will authorize us to regard it as a second appeal. The citation, which afterwards issued in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order." That is precisely the case before us, and we think the ruling a sound one.

The appeal must, for these reasons, be DISMISSED. But, we may add, that for anything we have been able to discover in this record, the appellants have the same right now, whatever that may be, to take a new appeal, that they had in November, 1865, when the unsuccessful effort was made to revive the first one.

BENBOW v. IOWA CITY.

A return to a mandamus ordering a municipal corporation forthwith to levy a specific tax upon the taxable property of a city for the year 1865, sufficient to pay a judgment specified, collect the tax and pay the same, or show cause to the contrary by the next term of the court, is not answered by a return that the defendants, "in obedience to the order of the court, did proceed to levy a tax of one per cent. upon the taxable property of the said city, for the purpose of paying the judgment named in the information, and *other claims*, and that the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied." The return should have disclosed the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator. It was also erroneous in returning that the tax was levied to pay this judgment "and *other claims*."

ERROR to the Circuit Court for the District of Iowa.

Benbow recovered judgment on the coupons attached to certain bonds which Iowa City issued to pay its subscription

to the stock of the Mississippi and Missouri Railroad Company, and having failed by the ordinary process at law to obtain satisfaction of his judgment, he applied to the Circuit Court for a mandamus to compel the mayor and aldermen, in obedience to the provisions of the ordinance authorizing the issue of these bonds, to levy and collect the requisite tax to pay the judgment.

The court awarded the writ, and commanded the mayor and aldermen forthwith to levy a specific tax upon the taxable property of the city, for the year 1865, sufficient to pay the judgment, interest, and costs; collect the tax and pay the same, or show cause to the contrary by the next term of the court.

The defendants made return to the writ, that "in obedience to the order of the court, they did proceed to levy a tax of one per cent. upon the taxable property of the said city, for the purpose of paying the judgment named in the information, and *other claims*, and that the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied."

To this return the relator demurred as insufficient. The court overruled the demurrer and gave judgment accordingly; and the relator brought the case here.

It was submitted on the record and the brief of *Mr. Grant, for the relator, plaintiff in error.*

Mr. Justice DAVIS delivered the opinion of the court.

The sufficiency of the return is the sole question in the case. The return does not deny the obligation of the writ, nor offer an excuse for not obeying it, but states to the court that its command has been obeyed.

Is this true? The writ commanded that the taxes should not only be levied, but collected and paid to the relator, before the return day of the writ, yet, there is no averment of their collection and payment, nor an excuse furnished for non-performance. If it was impossible to collect and pay the taxes in the time allowed, the return should have stated facts from which the court could have inferred a legal

excuse for not doing it. On this point the return is wholly silent.

But the defect in this return reaches much further. In so far as it avers performance, it does it only in the words of the writ, which, if nothing more were required, would put the defendants in place of the court. To make the return properly responsive to the writ, it was necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator.

How could the court decide on the sufficiency of the levy to accomplish the purpose of the writ, without knowing the value of the taxable property of the city? The court should not only have been advised of the amount on which the levy was formed, but as the writ commanded, the year in which the valuation was made. The return is also defective in another important point. The mandate was to levy a specific tax to pay the relator's judgment; the return is, that the tax was levied to pay the judgment and *other claims*. The nature and extent of these claims were not given, and the court had, therefore, no means of ascertaining whether the fund to be raised would be sufficient for their discharge, and the satisfaction of the relator's demand. But, apart from this, there was no authority to import outside claims into this levy.

The relator had been deprived of his annual interest, because these defendants had neglected to provide for it, as they were required to do by the ordinance which authorized the creation of the debt. To compel the performance of this omitted duty the mandamus was issued, and *it* did not empower the mayor and aldermen to embarrass the levy which it directed, by joining with it other obligations against the city, with which this relator had no concern.

Without pursuing the subject further, enough has been said to show that the demurrer to the return should have been sustained.

The judgment of the Circuit Court is REVERSED, and the cause remanded with directions to proceed

IN CONFORMITY WITH THIS OPINION.

BOYD *v.* MOSES.

1. The stipulation of a charter-party of a ship to take a cargo of lawful merchandise, implies that the articles composing the cargo shall be in such condition, and be put up in such form, that they can be stowed and carried without one part damaging the other.
2. The master of a ship may, therefore, refuse to take goods offered for shipment, if in his honest judgment they are in such condition or of such character, that they cannot be carried without injury to the rest of the cargo, without violating a charter-party containing the condition mentioned.
3. Accordingly, where lard, leaking from casks in which it was packed, was brought to a ship, for shipment, under a charter-party, containing a condition to take "a cargo of lawful merchandise," the hold of which ship was, at the time, loaded with grain, the master was justified in refusing to receive it in that condition, he being of opinion, in the honest exercise of his judgment, that it could not be carried without injury to the rest of the cargo.
4. The master having refused to receive the lard, in its leaking condition, unless the charterers of the ship gave him an agreement to hold the ship harmless; and they thereupon having written to him a letter referring to his refusal, and requesting him to receive the lard, and agreeing to pay any damages which he or the ship might be subjected to on the discharge of the cargo, arising from the stowage of the lard between decks, and its running on any other part of the cargo; and upon the receipt of this letter, the master having consented to take the lard, and having stowed it between decks, and damages having subsequently occurred to the grain in the hold, from the leaking of the lard—*Held*, that the agreement contained in the letter was a modification of the terms of the charter-party in respect to the lard, and relieved the ship from the responsibility of safe carriage of the cargo, so far as that was affected by the lard; and was equivalent to a stipulation to that effect embodied in the charter-party; and that the stipulation, though of no efficacy as between shipper and vessel, was valid as between charterer and owner.

THIS was an action in *personam*, brought originally in the District Court for the Southern District of New York, by the libellants against the appellants, to recover a balance due upon a charter-party. The District Court rendered a decree dismissing the libel. The Circuit Court for the district reversed that decree, and rendered a decree for the libellants. From this last decree an appeal was taken to this court.

The charter-party was executed in July, 1862, at the city

of New York, in the harbor of which city the ship then lay. The voyage stipulated was to be from New York to Havre, with a cargo of lawful merchandise, which the charterers were to provide. The ship was to be tight, stanch, strong, and every way fitted for the voyage. She was to load "under inspection," and to "go consigned to charterers' friends."

The cargo furnished by the charterers consisted principally of grain, lard, and tallow. The grain, which was partly in bulk and partly in bags, was stored in the hold. A portion of the lard was stored between decks. By the leaking of this lard a part of the wheat in the hold was damaged, and the question was, whether the damage should be borne by the owners or the charterers of the ship. It was charged to the ship at Havre, and paid by the consignees, who collected the freight, and its amount was withheld by them from the charter-money. The present action was by the owners against the charterers of the ship for the balance thus withheld.

When the lard was brought to the ship to be taken on board it was leaking from the casks in which it was packed. It appeared to be mostly in a liquid state, and the stevedore having charge of the loading refused without the consent of the master to receive it, and store it between decks,—the only part of the vessel not then occupied by merchandise. He was apprehensive that in its liquid state, leaking from the casks, it would penetrate through the deck and damage the wheat in the hold. The master, to whom the matter was referred, also refused to take it, and informed the charterers that he could not receive it unless they gave him an agreement to hold the ship harmless. They thereupon wrote to him a letter stating that they understood he objected to their shipping lard between the decks of the ship, requesting him to receive it, and agreeing to pay any damages which he or the ship might be subjected to on the discharge of the cargo at Havre, arising from the stowage of the lard between decks, and its running on any other part of the cargo. Upon the receipt of this letter the master consented to take the lard, and it was stowed between decks.

There were between three and four hundred casks, and the lard was leaking from nearly all of them. The weather was unusually hot during the time the ship was receiving cargo, so that it became necessary to relieve the stevedores by *extra* men, and on some days they could not work at all. The weather continued warm during the greater part of the voyage, which lasted over a month. Upon the discharge of the cargo twenty-six casks were found entirely empty, and three hundred and twenty-seven partly empty. The decks were covered with lard in a liquid state, being in some places two or three inches deep, which had destroyed the pitch in the seams and rotted the oakum, and had dripped through and injured a large quantity of the wheat in the hold.

There was no dispute as to the extent of the damage thus produced. As already stated, the question was upon whom should the damage fall, the charterers or the owners of the ship?

The consignees of the ship at Havre were designated by the charterers as their *friends*, pursuant to the stipulations of the charter-party, and acted as their agent, and not for the master, in collecting the freight.

Mr. E. C. Benedict, for the appellants; Mr. E. H. Owen, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The stipulation of the charter-party to take a cargo of lawful merchandise necessarily implied that the articles composing the cargo should be in such condition, and be put up in such form, that they could be stowed and carried without one part damaging the other. Whether in any case articles offered can be taken with safety to other articles, will depend upon a variety of considerations; the nature of the articles, the state of the weather, the voyage contemplated, the amount of cargo already received, and other particulars. Lard, for example, can be carried in winter to a northern port in loose casks with little damage to other articles, whilst injury may be reasonably apprehended if the

voyage is to be made through the tropics, and the casks are not perfectly tight. Very different care must necessarily be given by the master in receiving and stowing goods perishable in their nature from heat or moisture, and such as are unaffected by either. All that is required of him in such case—he being a competent officer—in determining whether particular goods are at the time in shipping order and condition, or can be received in the state and stowage of cargo already aboard, is that he shall not act capriciously or without due consideration, but shall exercise an honest and reasonable judgment in the matter.

In *Weston* v. *Foster*,* the whole of the vessel, except the cabin and room for the crew, sails, cables, and provisions, was let, and the owners covenanted to receive all such lawful merchandise as the charterers should choose to put on board. The master, who was a competent officer, took on board all the cargo he thought his vessel could safely carry, which, however, did not fill it, but left a space capable of holding fifty tons more, and the charterers insisted that there should be deducted from the freight-money the amount they would have received if fifty tons more had been brought. But the court held that the whole charter-money was earned, and that the honest opinion of the master, though not absolutely binding on the charterers, could only be controlled by decisive evidence of a mistake on his part.

The master was here sustained in refusing to take all the cargo the hold of the vessel could receive, because, in the exercise of his honest judgment, he thought it would endanger her safety, notwithstanding the terms of the charter-party. Upon the same principle he may refuse to take goods offered, if in his honest judgment they are in such a condition or of such character that they cannot be carried without injury to the rest of the cargo.

In *Weston* v. *Minot*,† where a vessel was chartered for a voyage to Calcutta and back, to carry all lawful goods placed on board, and for a gross sum for freight out and back, to

* 2 Curtis, 119.

† 3 Woodbury & Minot, 486.

the entire capacity of the vessel, it was held that the charter-party must be considered to mean all goods not contraband nor diseased, and as many of them as could be put on board without making the vessel draw too much for safety, and that, if the goods put on board were heavy articles, and, before the ship was full, sunk her as low as is usual and proper without extra danger, the master might refuse to take more without violating the charter-party.

The principle upon which the action of the master was justified in these cases applies to the case at bar. Safety to the cargo received on board, though not so high a consideration as safety to the ship, is one which should constantly govern the action of the master.

That his apprehensions were well founded in this case is established by the result. His conduct, therefore, in insisting upon protection to his ship, was reasonable, and this was in effect conceded by the charterers, as otherwise they would have insisted upon the ship receiving the lard, or that the matter should have been submitted to the inspector under whose inspection it was stipulated the ship was to be loaded.

The agreement contained in the letter must be considered as a modification of the terms of the charter-party in respect to the lard in question. It relieved the ship from the responsibility of safe carriage of the cargo so far as that was affected by the lard. It may be regarded as a stipulation to that effect embodied in the charter-party; a stipulation which, though of no efficacy as between shipper and vessel, was valid as between charterer and owner.

If the charterers had owned the entire cargo, and had induced the master, against his objection, to receive and carry the lard in its leaking condition, they would not have had any right of action against the ship for the damage sustained, nor could they have recouped or set-off the amount of damage in an action against them for the charter-money. The principle upon which the ship would be exempt from liability in such case is applicable to the present case between the charterers and owners.

DECREE AFFIRMED.

Statement of the case.

TWITCHELL v. THE COMMONWEALTH.

1. Writs of error to State courts are not allowed as of right. The practice is to submit the record of the State courts to a judge of this court, whose duty it is to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the State, and whether the case upon the face of the record will justify the allowance of the writ.
2. The present case being one, however, where the petition was made by a prisoner under sentence of death, within a very few days, the motion for allowance was permitted, in view of that circumstance, to be argued, at the earliest motion-day, before the full bench.
3. The court conceding that neither the 25th section of the Judiciary Act of 1789, nor the act of February 5th, 1867, makes any distinction between civil and criminal cases, in respect to the revision of the judgments of State courts by this court, decided that—
4. The 5th and 6th Amendments to the Constitution of the United States (relating to criminal prosecutions), were not designed as limits upon the State governments in reference to their own citizens, but exclusively as restrictions upon Federal power; *Baron* v. *The City of Baltimore* (7 Peters, 243), *Fox* v. *Ohio* (5 Howard, 434), and other cases to the same point with them, being herein concurred in.

THIS was a petition, by one Twitchell, for a writ of error to the Court of Oyer and Terminer of the City and County of Philadelphia, and the Supreme Court of Pennsylvania, with a view to the revision here of a judgment of the former court, affirmed by the latter court, which condemned the petitioner to suffer death for the crime of murder.

The case was this:

The Constitution of the United States, by its 5th Amendment, ordains, that no person shall be held to answer for a capital crime, nor be deprived of life "without due process of law;" and, by its 6th, that in all criminal prosecutions the accused shall enjoy the right "to be informed of the *nature and cause* of the accusation."

With these provisions of the Constitution in force, the legislature of Pennsylvania, by a statute of the 30th March, 1860, to consolidate, amend, and revise its laws relative to penal proceedings and pleadings, enacted thus:

"In any indictment for murder or manslaughter, it shall not

be necessary to set forth the *manner in which*, or the *means by which* the death of the deceased was caused; but it shall be sufficient in every indictment for murder, to charge that the defendant *did feloniously, wilfully, and of malice aforethought, kill and murder the deceased.*"

Under this statute Twitchell was indicted in the Court of Oyer and Terminer at Philadelphia, in December, 1868, for murder, the indictment presenting, that on a day named, he and his wife, with force, and arms, &c., "feloniously, wilfully, and of their malice aforethought, did make an assault," and one Mary Hill, "feloniously, wilfully, and of their malice aforethought, did kill and murder," contrary to the form of the act, &c. On this indictment Twitchell was convicted, and the Supreme Court of the State having affirmed the judgment, he was sentenced to be hanged on the 8th April, 1869.

Eight days previously to the day thus fixed, Mr. W. W. Hubbell, counsel of the prisoner, asked, and obtained leave, in this court, to file a motion for a writ of error, as above said, in the case; with notice to the Attorney-General of Pennsylvania, that the motion would be heard on Friday, April the 2d, the earliest motion-day of the court. The petition was heard, before the court *in banc*, on the 2d, accordingly. It set forth that, pending the suit, Twitchell had set up and claimed certain rights and privileges under the said 5th and 6th Amendments to the Constitution of the United States, and that the final decision was against the rights and privileges so set up and claimed. He therefore prayed, in order that the said Twitchell should enjoy his just privileges under the Constitution, and that what of justice and right ought to be done, should be done, that a writ of error should issue from this court to the Court of Oyer and Terminer of the City and County of Philadelphia, and the Supreme Court of Pennsylvania, with a view to the re-examination here of the judgment of the former court, affirmed by the latter.

The application was made under the 25th section of the

Argument in support of the motion.

Judiciary Act of 1789; the section* which gives such writ, where is drawn in question the validity of a statute of, or authority exercised under any State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution or statute of the United States, and the decision is against the title, right, privilege, or exemption specially set up, &c.; a provision, this last, re-enacted by act of February 5th, 1867,† with additional words, as "where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up," &c.

Mr. Hubbell, in support of the motion, contended, that the act of the Pennsylvania Assembly was repugnant to the 5th and 6th Amendments of the Constitution—to the last especially—that under these the prisoner had a right to be informed, before the trial, by the indictment, and so of record, that the murder was alleged to have been brought about by some particular instrument, or some instrument generally, or some means, method, or cause stated; to be informed, in other words, of the specific nature of the accusation, so as that he might be enabled to prepare for a defence; whereas, here the indictment stated but the general nature of the accusation, namely, that the prisoner had murdered Mrs. Hill; that the provisions of the Pennsylvania statute had been copied from a late British statute, and had departed from the principles of the common law—principles not more considerate and humane than just;—which, nevertheless, under the Constitution of the United States, remained, and remaining, were secured to all men; that the court below erred in not deciding in accordance with the view here presented, and that the warrant of the Governor for the execution was, therefore, not a "due process" of

* 1 Stat. at Large, 85. † 14 Id. 385.

law. In such a case the petitioner had a clear *right* to the interposition of this court, which he now respectfully asked. Mr. Hubbell read, in detail, cases* to show that the appellate power of this court extends to criminal cases, where the State is a party.

Mr. B. H. Brewster, Attorney-General of Pennsylvania, did not appear.

The CHIEF JUSTICE, on the Monday following, delivered the opinion of the court.

The application for the writ of error is made under the 25th section of the Judiciary Act of 1789, which makes provision for the exercise of the appellate jurisdiction of this court over judgments and decrees of the courts of the States.

Neither the act of 1789, nor the act of 1867, which in some particulars supersedes and replaces the act of 1789, makes any distinction between civil and criminal cases in respect to the revision of the judgments of State courts by this court; nor are we aware that it has ever been contended that any such distinction exists. Certainly none has been recognized here. No objection, therefore, to the allowance of the writ of error asked for by the petition can arise from the circumstance that the judgment, which we are asked to review, was rendered in a criminal case.

But writs of error to State courts have never been allowed, as of right. It has always been the practice to submit the record of the State courts to a judge of this court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the State, and whether the case upon the face of the record will justify the allowance of the writ.

In general, the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or

* Cohens v. Virginia, 6 Wheaton, 264; Worcester v. Georgia, 6 Peters, 515.

decided; and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court.

In the case before us we have permitted the motion for allowance to be argued before the full bench because of the urgency of the case, and the momentous importance of the result to the petitioner.

It is claimed that the writ should be allowed upon the ground that the indictment, upon which the judgment of the State court was rendered, was framed under a statute of Pennsylvania in disregard of the 5th and 6th Amendments of the Constitution of the United States, and that this statute is especially repugnant to that provision of the 6th Amendment which declares, "that in all criminal prosecutions the accused shall enjoy the right" "to be informed of the nature and cause of the accusation against him."

The statute complained of was passed March 30, 1860, and provides that "in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused; but it shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, wilfully, and of malice aforethought, kill and murder the deceased; and it shall be sufficient, in any indictment for manslaughter, to charge that the defendant did feloniously kill the deceased."

We are by no means prepared to say, that if it were an open question whether the 5th and 6th Amendments of the Constitution apply to the State governments, it would not be our duty to allow the writ applied for and hear argument on the question of repugnancy. We think, indeed, that it would. But the scope and application of these amendments are no longer subjects of discussion here.

In the case of *Barron* v. *The City of Baltimore*,* the whole

* 7 Peters, 243.

question was fully considered upon a writ of error to the Court of Appeals of the State of Maryland. The error alleged was, that the State court sustained the action of the defendant under an act of the State legislature, whereby the property of the plaintiff was taken for public use in violation of the 5th Amendment. The court held that its appellate jurisdiction did not extend to the case presented by the writ of error; and Chief Justice Marshall, declaring the unanimous judgment of the court, said:

"The question presented is, we think, of great importance, but not of much difficulty. . . . The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes."

And, in conclusion, after a thorough examination of the several amendments which had then (1833) been adopted, he observes:

"These amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them."

And this judgment has since been frequently reiterated, and always without dissent.

That they "were not designed as limits upon the State governments in reference to their own citizens," but "ex-

clusively as restrictions upon Federal power," was declared in *Fox* v. *Ohio*, to be "the only rational and intelligible interpretation which these amendments can have."* And language equally decisive, if less emphatic, may be found in *Smith* v. *The State of Maryland*,† and *Withers* v. *Buckley and others*.‡

In the views thus stated and supported we entirely concur. They apply to the sixth as fully as to any other of the amendments. It is certain that we can acquire no jurisdiction of the case of the petitioner by writ of error, and we are obliged, therefore to

REFUSE THE WRIT.

TYLER v. BOSTON.

1. When a patent is claimed for a discovery of a new substance by means of chemical combinations of known materials, it should state the component parts of the new manufacture claimed, with clearness and precision, and not leave the person attempting to use the discovery to find it out by "experiment."
2. The doctrine of equivalents as applied to chemical inventions explained, and the distinction between mechanical inventions and chemical discoveries, where experiment is required to ascertain the effect of chemical substances, pointed out.
3. Whether one compound of given proportions is substantially the same as another compound varying the proportions, is a question for the jury.

TYLER brought suit, in the Circuit Court for Massachusetts, against the city of Boston, for infringement of a patent; the case being this:

The plaintiff professed to have discovered a new compound substance, being a combination of fusel oil with the mineral and earthy oils, which compound constitutes a burning fluid, "by which term," he says, "I mean a liquid which will burn for the purpose of illumination, without material smoke, in a lamp with a small solid wick, and without a chimney."

The claim of his patent which the defendant was charged

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* 5 Howard, 434. † 18 Id. 76. ‡ 20 Id. 90.

with infringing, was "the compound produced by the combination of the mineral or earthy oils with fusel oil, in the manner and for the purpose substantially as herein set forth; said compound constituting a new manufacture."

The component parts of this new manufacture were described as "by *measure* crude fusel *oil one part*, kerosene *one part*." This combination, the patent stated, might be varied by the substitution of naphtha or crude petroleum in place of kerosene, or a part of the kerosene by an *equal quantity* of naphtha or crude petroleum; "the exact quantity of fusel oil which is necessary to produce the most desirable compound must be determined *by experiment*."

The defendants used a burning fluid composed of naphtha seventy-two and fusel oil twenty-eight parts; and *experts*, chemists, proved that seventy-two parts *in bulk* of naphtha was the *substantial equivalent* of twenty-eight parts of kerosene.

The court below charged the jury, "that the patentee, in suggesting that naphtha might be substituted for kerosene, intended to describe the same proportion in the combination," and "that the jury should understand the construction of the suggested substitution, to wit, naphtha for kerosene, as contemplating the same proportion of the two ingredients—that is, one and one, or fifty per cent. of one, and fifty per cent. of the other."

It charged further, that "whether one compound of given proportions is substantially the same as another compound varying in the proportions—whether they are substantially the same or substantially different—is a question of fact, and for the jury."

Under this charge the jury found for the defendant; and the case was now here on error.

Mr. Maynadier, for the plaintiff in error, contended, that the construction given by the court to the patent was erroneous, and that in view of the evidence as to the true relations and characters of the various oils, the claim should be construed to cover not only a compound composed of the particular in-

gredients in the proportionate bulks especially named in the specification (that is to say, *crude* fusel oil, one part *by measure*, and kerosene *of the grade there described*, one part by measure), and all other compounds composed of these ingredients in substantially the same proportionate bulks; but, in addition, all other compounds whose ingredients are *any* of the earthy or mineral oils, and *any* of the fusel oils, provided the quantity by measure of the mineral oil or oils used were ascertained to be substantially *equal in character*, or equivalent to the prescribed proportion of the prescribed grade of kerosene; and the quantity by measure of the fusel oil used were in like measure ascertained to be equal to the prescribed proportion of the prescribed *crude fusel oil.*

The whole spirit of the patent, in view of the perfectly well-known relations of naphtha and kerosene, and of refined and crude fusel oil, warrants the construction contended for, and there is nothing in the letter which militates against it, unless the statement that "a part of the kerosene may be replaced by an *equal quantity* of naphtha or crude petroleum" be construed to mean an *equal quantity in bulk*, which would make the statement false, and one that all persons skilled in the art would know to be false; while if "equal" be construed to mean "equal in character," or "equivalent," the statement is true, and in harmony with the rest of the specification, and with the chemical facts of the case.

Mr. Robb, contra:

The instruction given was correct. The language used by the patentee in describing his invention and the manner of compounding the same, is "full, clear and exact," in view of that construction adopted by the court below. To give it the construction contended for by the plaintiff, the obvious import of the terms used must be disregarded, and the same word must be taken in different senses, in the same sentence; that is, the word "quantity," when used in reference to fusel oil, alcohol, or kerosene, means measure; but when used in reference to naphtha or petroleum, it must be taken to mean weight.

Opinion of the court.

Mr. Justice GRIER delivered the opinion of the court.

The patent states that "the exact quantity of fusel oil which is necessary to produce the most desirable compound must be determined *by experiment.*"

Now a machine which consists of a combination of devices is the subject of invention, and its effects may be calculated *a priori*, while a discovery of a new substance by means of chemical combinations of known materials is empirical and discovered by experiment. Where a patent is claimed for such a discovery, it should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find it out "by experiment." The law requires the applicant for a patent-right to deliver a written description of the manner and process of making and compounding his new-discovered compound. The art is new; and therefore persons cannot be presumed to be skilled in it, or to anticipate the result of chemical combinations of elements not in daily use.

The defendants used a burning-fluid composed of naphtha seventy-two and fusel oil twenty-eight parts; and expert chemists proved that seventy-two parts *in bulk* of naphtha was the *substantial equivalent* of twenty-eight parts of kerosene.

This term "*equivalent*," when speaking of machines, has a certain definite meaning; but when used with regard to the chemical action of such fluids as can be discovered only by experiment, it only means *equally good.* But while the specification of the patent suggests the substitution of naphtha for crude petroleum, it prescribes no other proportion than that of equal parts by measure. The explanation that the "kerosene must be replaced by an *equal quantity* of naphtha" does not alter the case.

The charge which the court gave is a clear and intelligible statement of the principles of law which should govern the jury in making up their verdict. It said properly, that "whether one compound of given proportions is substantially the same as another compound varying in the pro-

portions—whether they are substantially the same or substantially different—is a question of fact and for the jury."

If the jury in finding for the defendants have erred, the remedy is not in this court.

JUDGMENT AFFIRMED.

GRANT v. UNITED STATES.

1. An "inspection" at the place of shipping instead of at the place of delivery, by the officers of the United States, of supplies which a contractor has agreed to deliver at a distant point, does not pass the property to the United States so as to relieve the contractor from his obligation to deliver at such distant point.
2. Where a contract with the government to furnish to it supplies does not stipulate for an inspection at a place earlier than the place of delivery, it is optional with the contractor whether he will have the goods inspected at such earlier place.
3. Where a delay by the government in making an inspection of supplies, agreed to be made at the place of shipping instead of at the place of delivery, is not the proximate cause of a loss of the supplies afterwards suffered, the loss must be borne by the party in whom the title to the supplies is vested; and, if still in the contractor, by him.
4. This rule applies even where supplies have been seized by the public enemy without any default of the owner.
5. Where the government makes a contract with an individual that he shall furnish *all supplies needed* at a certain post, and afterwards rescinds the contract, the individual cannot recover from the government for a breach of the contract unless he prove that supplies were needed at the post designated.
6. The Court of Claims was not instituted to try cases of mere nominal damages.

APPEAL from the Court of Claims; in which court Grant, for himself, and as assignee of one Taliafero, a former partner, had filed a petition claiming reimbursement and damages from the United States. The case was this:

On the 9th of March, 1860, the Secretary of War, at that time Mr. Floyd, addressed an order to the Quartermaster-General and Commissary-General of Subsistence, granting to the said Taliafero and Grant the privilege of furnishing

and delivering, at certain posts in Arizona, for a period of two years, *all the supplies that might be needed there* for the use of the service, at certain stipulated rates. There was nothing in this order making an inspection necessary elsewhere than at the place of delivery.

On the 29th of July, 1860, the proper officer in Arizona served a requisition on Grant for commissary articles, and the War Department approved the order on the 22d day of September following, with notice that the articles to be purchased would be inspected at Boston or New York.

Some delays took place in regard to the inspection; for the appointment of a proper person to make which, the shipping agents of Grant had made a request on the 20th September, 1862. Major Eaton finally inspected the last of the supplies, certifying that they were contained in strong, sound, full-hooped barrels and well-secured tierces, properly marked with the names of the places to which they were destined, and were of the kind and quality usually provided by the subsistence department. This inspection did not take place until the 3d, 4th, 5th of December, 1860. The Court of Claims found, however, as facts, that the only delay attributable to the United States was a delay in appointing an inspector from the 22d September to the 21st November, 1860; that such delay did not preclude Grant's agents from purchasing the supplies required, and having them ready for inspection; that the supplies inspected by Major Eaton were sold to Grant on the 20th of November, 1860; that the United States were ready to inspect supplies on the 21st of November, 1860, and thereafter, and on that date so notified to Grant's agents; that the inspection was not made at that time, but was postponed at the request of the said agents from the difficulty they had found in procuring a part of the supplies; that these were not then ready for shipment and inspection; that there was no evidence of any notice to the United States to make inspection other than one contained in a letter of the agents to Major Eaton, dated November 22d, 1860.

The supplies thus inspected were immediately afterwards

shipped to Lavacca, and arrived there about the 10th January, 1861. They were here laden on wagons, forty-one wagons in all, but after proceeding a short distance, the train was obliged, owing to want of pasturage at that season of the year, to stop and go into camp and await the growth of grass. A delay was thus incurred of about two months and ten days, when the train again proceeded, and arrived at Rio Honde, where it was captured on the 20th April by the troops of Texas, then in a state of rebellion against the United States.

For the goods, wagons, and teams thus lost, the petitioners claimed reimbursement.

The petition also set forth great loss to the petitioner, asking damages for it, from the fact that while, as alleged, he was in the due execution of his contracts, and actually engaged in the transportation of supplies from Lavacca to Arizona, the United States, of its own wrong, and without any fault or negligence on his part, and without notice to him, and without his agreement or consent, had set aside and rescinded the said contracts. On this part of the case it appeared that in April, 1861, the Assistant Commissary-General had recommended to Mr. Cameron, by this time Secretary of War, that the contracts "be rescinded," and that, from a sense of insecurity, certain of the articles should be forwarded from St. Louis, and that others might be procured in Arizona or Sonora, of those persons who would furnish them at the cheapest rates. The secretary approving the order, the contract was no longer regarded by the United States as valid.

The Court of Claims dismissed the petition, and the claimant appealed.

Mr. C. B. Gooderich, for the appellant:

I. The petitioner submitted to and acted upon the direction to inspect at Boston and New York. That it was competent for the secretary and the petitioner to agree to inspect at those places, and, to that extent, to modify the terms of the original order, there can be no doubt. The petitioner having

acted upon it, *pro tanto*, the government cannot be allowed to say it was not obligatory upon him. The fact, if it were a fact, that the direction of the War Department for the inspection in Boston and New York, was for the benefit of the contractor, cannot destroy his rights under the modification of the contract.

The inspection by Major Eaton, his acceptance thereof, as shown by his certificate, passed the title in and to the goods inspected and marked.

After inspection and marking, the goods remained in the possession of the claimant but for *transportation*. The completion of this was prevented by the public enemy, and consequently the loss must be borne by the government. The capture of the goods by an armed force, in rebellion, acting with intent to subvert the government, under the facts found in the case, is a delivery to the United States of the goods ordered.

The relation of the parties, the purpose of the seizure made by the enemy, the use for which the supplies were intended, taken in connection with the fact that the petitioner, as a contractor with the government, must be regarded as in its service, and was rightfully in the face of the enemy, conduce to show that the capture, in this case, by an armed enemy of the government, stands upon grounds peculiar and distinct from those which may or may not apply to a capture from a contractor under other circumstances.

Upon principle, in all cases in which private property is seized by a public enemy, without any default of the owner, the government is bound to sustain the loss. Vattel* concedes the principle, although he adds, "that no *action lies* against the state for misfortunes of this nature." He denies but the remedy. He says that "the sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it."

II. The rescission of the contract, by Secretary Cameron, without cause shown, and in the absence of any default on

* Law of Nations, p. 403.

the part of the petitioner, entitles him to damages, which are to be determined by an ascertainment of the profits which he would have made if the contract had not been rescinded, or by a consideration of the expenses which the petitioner had incurred in obtaining teams, &c., to enable him to execute his contract.

Mr. Dickey, Assistant Attorney-General, contra, contended:

I. That the claim for the loss of *private property* taken in war by the enemy, could not be sustained on principles of law, and was no such claim as the Court of Claims has jurisdiction to try and allow.

That the inspection of goods of a contractor thousands of miles from the place of delivery, did not vest the property so inspected in the United States.

That the whole claim for the loss by capture rested upon the position, that this resulted, without the fault of claimant, from delays caused by the culpable neglect of the United States to inspect the goods at an earlier day; but that the facts did not sustain the claim.

II. As to the rescission. That assuming that the *order* of Secretary Floyd was a contract, it nowhere appeared that any such supplies were needed after the rescinding of the order. The rescinding of it, therefore, was after the full execution of it, inasmuch as all the supplies needed, &c., had already been furnished, and nothing remained to be done under the order, or if it were a contract, under the contract.

Mr. Justice DAVIS delivered the opinion of the court.

On the theory that the order of the Secretary of War of March 9th, 1860, granting to Taliafero and Grant the privilege of furnishing and delivering, at certain posts in Arizona, for two years, all the supplies that might be needed there for the service, at certain stipulated rates, was a contract, mutually binding on the government and the claimant, the obligations imposed on the parties to it are clearly defined.

It was the duty of the claimant, as well as his exclusive privilege, to furnish all the supplies which were needed for

the use of the service in Arizona, and on the receipt of the goods *there*, the government was bound to pay him for them the prices which were fixed in the order. It is too plain for controversy, that the property did not vest in the United States until it was delivered. To escape the force of this rule at law, it is insisted, as the goods were inspected in New York and pronounced to be of the proper kind and quality, that the title then passed to the United States, and that they only remained in possession of the claimant for transportation, and as he was prevented from delivering them by the public enemy, the loss must be borne by the United States. This position cannot be sustained, for the inspection at New York, on which it is based, did not work a change of title in the property, nor was it in the contemplation of the parties that it should. It did not affect the contract at all. The goods, by a well-known usage of the War Department, had to be inspected somewhere, and as the contract contained nothing on the subject, it was for the advantage of the contractor that they should be inspected before shipment, rather than at the point of delivery. The War Department took upon itself no additional responsibility by inspecting them in New York, instead of Arizona, and this inspection in no wise relieved the claimant from any obligation which he had assumed. He had agreed to deliver the goods in Arizona, and until he did this there was no contract on the part of the government, either express or implied, to pay him for them. All that the certificate of Major Eaton, the inspecting officer, proves, is, that the goods, when presented to him for inspection, were contained in strong, sound, full-hooped barrels and well-secured tierces, properly marked with the names of the places to which they were destined, and were of the kind and quality usually provided by the subsistence department.

But, it is said the capture of the property is chargeable to the delay of the War Department in making the inspection, and in consequence of this, that the government is not only bound to pay for the supplies which were taken possession of by the enemy, but also to reimburse the claimant for the

loss of his wagons and teams. The answer to this is, that the order of the 9th of March, 1860, did not require inspection at Boston or New York, and if the Secretary of War chose to change the order afterwards, by directing that the goods should be inspected at those places, it was optional with the claimant whether or not he would submit to such direction.

But, conceding that the Secretary of War had the right to direct where the goods should be inspected, still he was not required to inspect, until the goods were substantially ready for inspection, and he was notified of the fact; and it is plain, by the finding of the court below, that after such notice and actual readiness, he did not culpably delay the inspection. The evidence shows very clearly, that the difficulty which the agents of the claimant experienced in filling the requisition, was the cause of the delay in inspecting and shipping the goods. If, however, it be admitted that the government was in default in not inspecting sooner, that default had no connection with the subsequent injury suffered by the claimant, and was not the proximate cause of it. In such a case the rule of law applies, that where property is destroyed by accident, the party in whom the title is vested must bear the loss.*

It is insisted that this rule does not apply where private property is seized by the public enemy without any default of the owner, and that in such a case the government is bound to indemnify the sufferers. But the principles of public law do not sanction such a doctrine, and Vattel (page 403) says no action lies against the state for misfortunes of this nature. "They are accidents caused by inevitable necessity, and must be borne by those on whom they happen to fall."

Whether there are equities in this particular case, and if so, whether they require that the claimant should be reimbursed, in whole or in part, for the capture of his property, under the circumstances, are questions that must be addressed

* McConihe v. The New York and Erie Railroad Company, 20 New York, 496.

to Congress, for it is not the province of the judicial department of the government to determine them.

The only remaining point in the case, relates to the rescision by Secretary Cameron of the order of the 9th of March. This proceeding was undoubtedly taken because the supplies needed in Arizona could be either purchased there at cheaper rates, or forwarded more securely from St. Louis. Whether the conduct of the Secretary of War was or was not justifiable, is not a question to be considered in deciding this suit, for the claimant has not shown a state of case on which he could recover if the rescinding order had never been made. The contract entitled him to furnish, at certain prices, all the supplies that might be needed in Arizona until the 20th of March, 1862. To enable him to recover, for a breach of this contract, he should have proved that supplies were needed at the posts in Arizona after the rescinding order was made, and the pecuniary loss he sustained in not being allowed to furnish them. This he has wholly failed to do.

We cannot see that this is a case for even nominal damages; but if it is, the Court of Claims was not instituted to try such a case.

JUDGMENT AFFIRMED.

UNITED STATES v. SHOEMAKER.

Prior to the act of June 12th, 1858, providing compensation not exceeding one quarter of *one per cent.* to collectors acting as disbursing agents of the United States in certain cases, such collector, if receiving his general maximum compensation, under the act of March 2d, 1831 (§ 4), and also his special maximum of $400, under the act of May 7th, 1822 (§ 18), could not recover on a *quantum meruit* or otherwise for disbursements made for building a custom-house and marine hospital at the port where he was collector.

ERROR to the Circuit Court for the Eastern District of Michigan.

This suit was brought by the United States on a bond

Statement of the case.

executed by Shoemaker and his sureties, the defendants, on the 19th of May, 1857, in a penalty of $20,000, conditioned that said Shoemaker, as disbursing agent for the new marine hospital and custom-house, at Detroit, Michigan, should well and truly disburse all moneys that may come into his hands from the Secretary of the Treasury for the object mentioned, and account for the same.

On the trial, the plaintiff proved that the defendant, Shoemaker, was collector of the customs at Detroit, in 1857 and 1858; that he was instructed by the Secretary of the Treasury to disburse about $200,000, appropriated by Congress, for building a custom-house and marine hospital at that port; and that, between the 1st April, 1857, and *the 12th June*, 1858, and subsequently, the collector made disbursements accordingly.

It was proved, also, that during all the above period he had been allowed and had received his general maximum compensation, under the act of March 2d, 1831, § 4, as collector; and also his special maximum of $400, under the act of May 7th, 1822 (which provides (§ 18), that no collector shall ever receive more than $400 annually, exclusive of his compensation as collector, for any service he may perform for the United States in any other office or capacity), and that he had been allowed one quarter of 1 per cent. upon all disbursements made *after* June 12th, 1858.

The plaintiff then rested; and the defendants, to maintain their defence, gave in evidence, that the balance shown in the treasury transcripts, against the collector, was composed of an excess over the $400 allowed, under the act of 1822, of 2½ per cent. upon his disbursements; and that this *per centum* was but a reasonable compensation for the service.

The act of August 4th, 1854,* authorized the building of a custom-house and marine hospital, at Detroit, and made an appropriation for the same. The duty was devolved upon the Secretary of the Treasury, and a sum equal to 10 per cent. of the moneys appropriated, was also appropriated to

* 10 Stat. at Large, 571, § 2, 3, 4.

cover the compensation of architects, superintendents, advertising, and other contingent expenses.

The act of *June 12th*, 1858,* provided that collectors of customs should thereafter be disbursing agents for the payment of all moneys appropriated for the construction of custom-houses, court-houses, &c., with a compensation not exceeding one quarter of 1 per cent. This act appropriated a small sum for fencing and grading the grounds about the hospital at Detroit. With this exception, no compensation had been allowed to the collector for the disbursement of the moneys made by him.

The court below directed the jury to find for the defendant if they believed his commission to be a reasonable one. Verdict and judgment went accordingly, and the United States brought the case here on error.

Mr. W. A. Moore, in support of the judgment, contended, that, prior to the act of June 12th, 1858, the disbursing of these moneys was no part of the official duty of the collector of customs. There was no law on the subject; and the Secretary of the Treasury had no right to require any such duty of the collector. The appointment was, therefore, in the nature of an agency of the Treasury Department. It might as well have been conferred upon any other person. And, unless restrained by some statute, Shoemaker was entitled to the same compensation that any other agent would have been.

Mr. Ashton, Assistant Attorney-General, contra.

Mr. Justice NELSON delivered the opinion of the court.

The question is, whether or not there is any law affording compensation for the service performed by the collector in this case.

The argument in support of it is, that before the act of 1858, which imposed this duty, and prescribed a compensation, the Secretary of the Treasury had no right to require

* 11 Stat. at Large, 327, § 17.

any such duty of the collector, and might as well have appointed some other person to perform it; and, hence, having appointed the collector, who accepted the appointment, and has performed the service, he is entitled to the same compensation as any other agent.

It may be that the collector might have refused the duty, and compelled the secretary to appoint another person. But this does not advance the argument, unless there can be shown some law providing for a compensation to be allowed such agent. No such provision is made in this act, nor are we aware of any authority in any other.

The question here, however, is—the collector having accepted the appointment and performed the service—is there any authority of law entitling him to retain, out of the moneys received, the 2½ per cent. as compensation for the disbursements. It is admitted that there is no act of Congress authorizing it. The claim must rest, therefore, in a *quantum meruit.* This might, under some circumstances, present a strong case against the government for the allowance of a reasonable compensation. But the difficulty here is, that there is not only no law providing for compensation, but the collector is forbidden to receive it. The act of May 7th, 1822, § 18, provides that "no collector, &c., shall ever receive more than $400, annually, exclusive of his compensation as collector, &c., for any services he may perform for the United States in any other office or capacity." And the act of 3d March, 1839,* that "no officer in any branch of the public service, or any other person, whose salaries, or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law." This act was substantially re-enacted 23d August, 1842,† with this addition: "And the appropriation therefor explicitly set forth that it is for such additional pay, extra

* § 8, 5 Stat. at Large, 349. † § 2, Ib. 510.

allowance, or compensation." This act was noticed and commented on in *Hoyt* v. *United States*.* The court there observe, that it cuts up by the roots these claims of public officers for extra compensation on the ground of extra services; that there is no discretion left in any officer or tribunal to make allowance, unless it is authorized by some law of Congress. This construction of the acts of 1822 and 1839 was affirmed in the case of *Converse* v. *United States*.† In that case a compensation was allowed for an extra service rendered by the collector, but it was allowed, for the reason that the service was rendered in pursuance of existing laws, and the appropriation for a compensation was made by law. The principle settled in that case is decisive against the allowance in the present one.

JUDGMENT REVERSED.

THOMSON v. DEAN.

1. The rule laid down in *Forgay* v. *Conrad* (6 Howard, 204), as to what constitutes a final decree for the purpose of an appeal, recognized as the true rule on the subject.
2. Hence, where a bill related to the ownership and transfer of certain stock, a decree was held to be final when it decided the right to the property in contest, directed it to be delivered by the defendant to the complainant by transfer, and entitled the complainant to have the decree carried immediately into execution; leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership.

THIS was a motion to dismiss an appeal from the Circuit Court for West Tennessee, on the ground that the decree from which it was taken was not final.

The record showed that the controversy related to the ownership and transfer of two hundred and four shares of the stock of the Memphis Gaslight Company, and to the rights of the parties under contracts relating to the purchase, sale, and transfer of the stock.

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* 10 Howard, 141. † 21 Id. 478.

Argument for dismissal.

The decree directed that Dean, the defendant below and appellant here, transfer forthwith upon the books of the company one hundred and ninety-four shares of the stock to one of the plaintiffs below, who are appellees here, and ten shares to another. It directed further, that account be taken and stated as to the amount paid and to be paid for the stock, and as to dividends accrued, and to be credited under the contracts between the parties. This decree was rendered on the 12th of March, 1868, and appeal was allowed on the same day. Bond was given on the 23d.

Mr. Phillips, in support of the motion:

It is, perhaps, not quite easy to reconcile all the decisions of this court on the question as to what is a "final decree" upon which an appeal will lie.

In *Forgay* v. *Conrad*,* Taney, C. J., delivering the opinion, says:

"Where the decree decides the right to the property in contest and directs it to be *delivered up*, or directs it to *be sold*, and the complainant is entitled to have it *carried into immediate execution*, the decree must be regarded as final *to that extent*, although it may be *necessary by a further decree to adjust the account* between the parties."

The principle thus laid down indicates that there may be more than one "final decree" in a cause. But later decisions seem not to sustain what is said in that case.

In *Beebe* v. *Russell*† the case of Forgay is referred to with the evident intent that it should not be regarded as establishing a principle. "The fact is," say the court, "that the order of reference to the master was *peculiar*, making it doubtful if it could in any way qualify the antecedent decree."

So far from sustaining the principle announced in Forgay's case, the court reiterates the decision in the case of *The Palmyra*,‡ where restitution, with costs and damages, had

* 6 Howard, 204. † 19 Id. 284. ‡ 10 Wheaton, 502.

been decreed, but the damages had not been assessed. This was held on appeal not to be a final decree. The ground of the holding was, that an appeal would lie on the decree awarding damages, and that the cause *could not be divided so as to bring up distinct parts of it.*

Again, it was decided that the term "final decree" is to be construed as it was understood in England and this country at the date when Congress acted upon the subject, and that at the date named, a decree was regarded as interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision; while it is true that a decree may be final, although it directs a reference to the master, provided all the consequential directions depending on the master's report are contained in the decree, so that no further decree will be necessary to give the parties the full benefit of the previous decision of the court.

The latest case is *Humiston* v. *Stainthorp.** The bill here was for infringement of a patent; the decree, a *permanent injunction*, with reference to the master to take an account of profits. The cases were fully discussed at the bar. But the court dismissed the appeal "according to a long and well-settled class of cases," which are referred to in a note.

No counsel appeared against the motion.

The CHIEF JUSTICE delivered the opinion of the court.

The question is whether the decree in this case was final for the purpose of appeal?

The eighth rule of the court, prescribing the practice of the United States courts in equity, directs that "if the decree be for the performance of any specific act, it shall prescribe the time within which the act shall be done, of which the defendant is bound to take notice," and that, "on affidavit by the plaintiff of non-performance within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which he shall not be discharged

* 2 Wallace, 106.

unless on full compliance, or by special order enlarging the time."

In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. No such change or modification was possible after the term, except on rehearing or by bill of review in the Circuit Court, or through appeal in this court.

So far as the court below was concerned, the decree in the case determined the principal matter in controversy between the parties. And since the decree could not be changed except through a new and distinct proceeding, it determined that matter finally.

Why, then, must it not be regarded as a final decree within the meaning of the acts of Congress providing for appeals?

The eighth rule of practice to which we have referred certainly regards such a decree as that now under consideration as final in respect to the act to be performed.

But it is insisted that this court has held that no decree which does not completely dispose of the whole cause is final, and that this decree, though disposing completely of the controversy as to the ownership of the stock, is not final, because it directs certain accounts to be taken.

It is true that this court has always desired that appeals be taken only from decrees which are not only final but complete; and has, upon one occasion, at least, directed the attention of the Circuit Courts to the expediency and importance of refraining from making final decrees on any part of a cause, however important, until prepared to dispose of it completely. Such a course would undoubtedly save much inconvenience, both to the Circuit Courts and this court, and diminish largely the expense of litigation to suitors.

And it may be true, that under the influence of these considerations the degree of finality essential to the right of ap-

peal has been sometimes pushed quite to the limit of construction. But we think that the current of decisions fully sustains the rule laid down by the late Chief Justice in the case of *Forgay* v. *Conrad*, and which we again declare in his own language: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed."

The reasoning in the case just cited fully vindicates this rule, in our judgment, as a sound construction of the acts of Congress relating to appeals, and is sustained by the authority of several decisions.*

And it is quite clear that the appeal under consideration is within this rule. The decree for which it was taken decided the right to the property in contest, directed it to be delivered by defendant to complainant by transfer, entitled the complainant to have the decree carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership.

It follows that the motion to dismiss must be

DENIED.

* Ray v. Law, 3 Cranch, 179; Whiting v. Bank United States, 13 Peters, 6; Michoud v. Girod, 4 Howard, 505. See also Orchard v. Hughes, 1 Wallace, 657; Milwaukie and Minnesota Railroad Co. v. Soutter, 2 Id. 440; Withenbury v. United States, 5 Id. 821.

GAINES v. THOMPSON.

The act of the Secretary of the Interior and Commissioner of the Land Office, in cancelling an entry for land, is not a ministerial duty, but is a matter resting in the judgment and discretion of these officers as representing the Executive Department. Accordingly, this court will not interfere by injunction more than by mandamus to control it.

APPEAL from the Circuit Court for the District of Columbia.

The Secretary of the Interior having directed the Commissioner of the Land Office to cancel an entry under which Gaines and others claimed an equitable right to certain lands in Arkansas, these last brought their suit in the Circuit Court of the District of Columbia, praying that the secretary and commissioner should be enjoined from making such cancellation. The defendants entered their appearance, and Wilson, the commissioner, filed a plea. The substance of this plea was that the matters set up in the bill were within the exclusive control of the executive department of the government, the secretary and commissioner representing the President, and that the court had no jurisdiction or authority to interfere with the exercise of this power by injunction. In point of fact the validity of the entry in question depended upon the construction of certain acts of Congress, upon the meaning of which different secretaries of the interior had been so far divided that it was thought best to take the opinion of the Attorney-General upon their interpretation.

The court below, sustaining the plea, dismissed the bill; and the question on this appeal was the correctness of such action.

Mr. J. L. Brent, for the appellant, went largely into the merits of the respective claimants, to show that the proposed cancellation was wrong, and ought to be enjoined. He

relied upon *Lytle* v. *Arkansas*,* *Cunningham* v. *Ashley*,† *Barnard's Heirs* v. *Ashley's Heirs*,‡ *Minnesota* v. *Bachelder*,§ and several other cases, in order to show that this court did constantly go into such merits and decide according to them, irrespective of decisions by the executive officers connected with the issue of patents.

Mr. Ashton, Assistant Attorney-General, contra, argued, that there were no functions within the range of the executive authority less ministerial in their character than those which devolved upon the officers of the land department in the administration of matters relating to the disposal of the public domain; that these officers had not merely the *right*, but were obliged to the *duty* of judgment and decision in them, and were directly responsible in determining the questions which arose before them only to the authority, within their own department of the public service, upon whom a supervisory jurisdiction had been conferred by statute.

The case was therefore within the principle which forbade judicial interference with the exercise of executive discretion; a principle lately so ably explained in this court in the case of *Mississippi* v. *Johnson*,‖ that it was almost unnecessary to refer to previous adjudications.¶

All the cases, he contended, cited by the appellants, in which the courts had undertaken to review ultimately the action of the land office, were cases between private parties, litigated after the legal title had passed, by patent or otherwise, out of the government. That right was undisputed.

Mr. Justice MILLER delivered the opinion of the court.

The extent of the jurisdiction which may lawfully be asserted by the Federal courts over the officers of the executive departments of the government, has been mooted in

* 9 Howard, 329; 22 Id. 202. † 14 Id. 382. ‡ 18 Id. 43.
§ 1 Wallace, 115. ‖ 4 Wallace, 499.
¶ Kendall v. United States, 12 Peters, 609; Decatur v. Paulding, 14 Ib. 515; Kendall v. Stokes, 3 Howard, 98; Brashear v. Mason, 6 Ib. 101; Reeside v. Walker, 11 Ib. 289.

this court from the case of *Marbury* v. *Madison** down to the present time; and while the principles which should govern the action of the courts in that regard have been settled long since, the frequent application of late to this court, and to other Federal courts, for the exercise of powers not belonging to them, shows that the question is one not generally understood.

In the case already referred to, of *Marbury* v. *Madison*, the Chief Justice commented at some length upon the power of the courts over the action of the executive officers of the government, in the course of which he arrived at the conclusion that it is a question which must always depend upon the nature of the act. He then argues, that by the Constitution the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and for which he is accountable only to his country and his conscience, and that he has officers to aid him in the exercise of these powers, who are directly accountable to him. The acts of such an officer, he says, can never, as an officer, be examinable in a court of justice. He holds, however, that where an officer is required by law to perform an act, not of this political or executive character, which affects the private rights of individuals, he is to that extent amenable to the courts. The duty which it was held in that case could be enforced in the proper court by mandamus, was the delivery of a commission already signed by the President. The point, as there presented, was new and embarrassing, and it is no reflection on the distinguished jurist who delivered the opinion to say, that the rule which governs the court in its action, in this class of cases, has since been laid down with more precision, without conflicting with the principles there stated.

In the case of *McIntire* v. *Wood*,† an application was made to the Circuit Court for the District of Ohio for a *mandamus* to the register of the land office, to compel him to issue certificates of purchase to plaintiff for lands to which he

* 1 Cranch, 137. † 7 Id. 504.

supposed himself entitled by law. This court was of opinion that no power had been vested by Congress in the circuit courts to issue the writ in such cases. The reasoning of the court is not extended, but the case bears a strong analogy to the one under consideration.

But in *Kendall* v. *United States*,* the majority of the court held that the courts of the District of Columbia had a larger power than the circuit courts, and could issue writs of mandamus to Federal officers in proper cases. As this is the first case in which the writ was actually ordered, it is worth while to examine the ground on which it was placed. "The act required to be done by the Postmaster-General," says the court, "is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster-General had no discretion whatever. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise."

In this language there is no ambiguity, and in it we find a clear enunciation of the rule which separates the class of cases in which the court will interfere from those in which it will not. In the subsequent case of *Decatur* v. *Paulding*,† where the writ was refused, the Chief Justice, who had dissented in the former case, accepts both the doctrine of the right to issue the writ by the court of the district, and of the cases in which it may be issued, as settled by the case of *Kendall* v. *United States*. "The first question, therefore, to be considered," he says, "is whether the duty imposed upon the Secretary of the Navy by the resolution in favor of Mrs. Decatur was a mere ministerial act?" The case of Mrs. Decatur arose under an act of Congress, and also a joint resolution of that body of the same date, both providing

* 12 Peters, 524. † 14 Id. 497.

compensation for the services of her deceased husband; but the measure of this compensation (which was to be paid to her by the Secretary of the Navy) was in the act different from what it was in the resolution. The secretary held that but one of these was intended by Congress, and gave her the election. She brought suit to compel him to give her both. It is clear she had no other legal remedy. The United States could not be sued. The secretary could not be sued in any other form of action than mandamus. But on the ground that the action of the secretary involved the exercise of judgment and discretion, the order of the Circuit Court refusing the writ was sustained.

This case is cited and relied on in the case of *The Commissioner of Patents* v. *Whiteley*,* and some of the observations of Chief Justice Taney, in delivering the opinion in the former, are so pertinent to the case before us, and state so well the relations of the judicial branch of the government to the officers engaged in the executive branch, that they may well be reproduced here.

Speaking of the functions of these officers, he says: "In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is required to act." "If," he says, "a suit should come before this court, which involved the construction of any of those laws, the court certainly would not be bound to adopt the construction given by the head of the department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But this judgment, upon the construction of the law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the acts of Congress, in order to ascertain the rights

* 4 Wallace, 522.

of the parties before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise judgment or discretion. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary exercise of his official duties. . . The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them." To the same effect are also the cases, *United States* v. *Seaman*;* *Same* v. *Guthrie*;† *Same* v. *Commissioner of Land Office*.‡

It may, however, be suggested, that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine, that an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of

* 17 Howard, 225. † Id. 284. ‡ 5 Wallace, 563.

the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

Accordingly, in the case of *The State of Mississippi* v. *Johnson*,* which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

In the same case the Chief Justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

The action of the officers of the land department, with which we are asked to interfere in this case, is clearly not of this character. The validity of plaintiffs' entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of Congress. It has been for a long time before the department, and has received the attention of successive secretaries of the interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney-General. It is far from being a ministerial act under any definition given by this court.

The numerous cases referred to by counsel, in which this court—after the title had passed from the United States, and the matter had ceased to be under the control of the executive department—has sustained the courts of justice in

* 4 Wallace, 475.

decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control.

DECREE AFFIRMED.

THE DIANA.

To justify a vessel of a neutral in attempting to enter a blockaded port, she must be in such distress as to render her entry a matter of absolute and uncontrollable *necessity*.

APPEAL from a decree of the District Court for the Southern District of Florida.

The schooner Diana was captured, on the 26th of November, 1862, by vessels of war of the United States, off Pass Cavallo, on the coast of Texas, then in rebellion against the United States, and, for some time previously, under blockade along the whole line of its coast, and taken to Key West for adjudication.

A libel in prize was filed against both vessel and cargo, in the District Court for the Southern District of Florida, in December, 1862, to which the master of the vessel interposed a claim in behalf of John Cabada, of Campeachy, Mexico, the alleged owner of the schooner, and in behalf of Miguel Canno, a Spanish subject residing at Campeachy, the alleged owner of the cargo. Subsequently a claim was filed by Idela Cabada, alleging that he was owner of the vessel, and that he had let her to one Miguel Canno on freight for a voyage from Campeachy to Matamoras, Mexico, in good faith.

The ship's papers showed that the vessel was on a voyage from Campeachy to Matamoras, and was consigned to one San Roman, at the port last named. She set sail on the 11th November, 1862.

Statement of the case.

When captured the vessel was near the port of Matagorda, off the coast of Texas. She was fourteen days from Campeachy, and was two hundred miles out of her direct course, having deviated therefrom on the third day out from Campeachy.

The master, in his deposition taken *in preparatorio*, testified that "the first port the vessel would have entered had she not been captured would have been the nearest convenient port of entrance, and the second would have been Matamoras," and "that for twenty-four hours previous to the capture the ship was steering toward the coast of Texas, in hopes to make a harbor, or beach, or something."

One of the seamen found on board testified that but for our capture "the vessel would have entered first the port of Cavallo," and that "they were running along the coast for an entrance, and that at the time of the capture the captured vessel was only some three miles from the lighthouse on Pass Cavallo Point."

In excuse for the position in which the vessel was found it was alleged that when three days out from Campeachy damage had resulted to the rigging of the vessel, causing her to deviate from her course, and that the master approached the coast "from no other motive than that of seeking shelter to repair the damage of his vessel."

The log-book, which had perhaps a somewhat elaborate and artificial aspect, stated that there had been a good deal of heavy weather; that the vessel worked much; that when three days out from Campeachy she "broke the clamp of the peak of the foresail," which it was necessary to wait till daylight to repair, but which then, at six o'clock in the morning, was repaired, the wind then being favorable, as it was generally, for going to Matamoras; that on the 15th she broke the bobstay of the bowsprit; and that "a lashing of rope was made to secure the said bowsprit, having no better means," and that sail was then made with double reefs. It indicated, generally speaking, variable weather, sometimes heavy, sometimes fine; that the vessel, however, required the pumps to be not unfrequently at work; that on the

25th she became uncertain about her longitude, and that on that day, under light variable winds, she "luffed all that was possible, for the purpose of finding soundings and determining our longitude, and by that means to enable us to make a straight course for our port of destination, or some port near by, where we might repair the damages sustained by the vessel and her rigging." Twenty-four hours afterwards she was captured, being, as already stated, now off the Texan port of Matagorda.

The following letter of instructions, from the owner of the vessel and the owner of the cargo to the master, was found among his papers.

[Translation.]

CAMPEACHY, November 10th, 1862.

DN. PEDRO JAUREQUIBERRY, present.

DEAR SIR AND FRIEND: We think it advisable to hand you this letter of instructions, in order that you may remember with greater facility and precision the objects of the voyage to be undertaken to-day by our pilot-boat "Diana," of which vessel you are master.

You have ample authority to dispose of the goods which are on board of the vessel, and to invest the proceeds in *the article* which we have mentioned to you *verbally*, not forgetting that our wishes as well as your personal interest consist in making the most of the article referred to.

Although the vessel goes consigned to Dn. Jose San Roman, you will do what you consider best for our interest. You should not disburse any money while you are able to make purchases from the proceeds of the invoice, and of such ship's stores as you can conveniently dispense with after reserving a sufficient quantity for the return voyage.

As we are embittered by the war which France has declared against the republic, upon the return voyage you will touch at Sisal or Celestun, where you will receive our instructions.

You will keep an accurate account of all moneys disbursed by you, in order that we may determine whether to continue or not these expeditions. We omit any further instructions which we

might give, having full confidence in your intelligence and activity.

We conclude by wishing you a safe voyage, and by acknowledging ourselves

Your friends, &c.,

CANNO & CABADA.

The cargo of the Diana consisted in part of rice, starch, coarse flannel, paper, nails, rum, brandy, shoes, and segars; articles which were nearly or quite as abundant at Matamoras as at Campeachy, but which were greatly needed in Texas, at the time, as already said, under blockade by the United States.

There was on board, apparently as a passenger, an Englishman, whose name appeared in the ship's papers as George Stites, but whose real name was George Chase, and who was a pilot, and a resident of Lavacca, Texas.

Acting Master Atkinson, of the United States Navy, in his deposition, taken by leave of court, testified that when he boarded the Diana, her master said that his purpose was to run the blockade; that he had before attempted to do so at St. Louis Pass and did not succeed, and that the same statement was made to him by the pilot of the Diana, who was part owner of the cargo.

Acting Master Samson, also of the United States Navy, in his deposition testified that Chase, the ostensible passenger on board, and who was part owner of the cargo, stated that he was engaged to act as her pilot in entering Matagorda Bay, or any other convenient port of Texas, and that the vessel was intended to violate the blockade; and that Chase made a written acknowledgment to this effect, in presence of several witnesses.

On the hearing, it was brought to the notice of the court that a person of the same name with the captain of the Diana, and residing at the same place, commanded the schooner Sea Witch, which was captured off the coast of Texas for an alleged intention to violate the blockade, and was restored to her owner upon the ground that while on a voyage from

Matamoras to New Orleans, she was driven out of course by heavy weather and had been damaged;* the same excuse which is offered in this case.

The District Court decreed restitution, and from the decree the United States appealed.

Mr. Ashton, Assistant Attorney-General, for the United States, relied upon the very suspicious facts disclosed by the case upon the position of the vessel, so far out of her proper course, and upon the circumstance, very remarkable if the case was one of innocence, that the captain of the vessel had been recently found on *another* vessel, in exactly the same unfortunate circumstances as he now invoked the interest of the court for, in the case of the Diana. He was not a *novus hospes* in this tribunal.

No opposing counsel.

Mr. Justice FIELD delivered the opinion of the court.

The schooner Diana was captured, in November, 1862, off Cavallo, near the entrance of Matagorda Bay, on the coast of Texas. According to her papers, she was on a voyage from Campeachy, in Mexico, to Matamoras, at the mouth of the Rio Grande; but at the time of her capture she had been fourteen days at sea and had passed two hundred miles beyond her alleged port of destination. We have no doubt that she was then seeking to enter a blockaded port on the coast. The master states in his deposition that the vessel, if she had not been captured, would have first entered the nearest convenient port, and afterwards gone to Matamoras, and that for twenty-four hours previous to her capture he was steering the vessel toward the coast in hopes of making a harbor or a beach. One of the seamen testifies that the vessel was running along the coast for an entrance; that at the time of her capture she was only three miles from the lighthouse on Pass Cavallo Point, and but for the capture would have entered the port of Cavallo.

* 6 Wallace, 242.

Opinion of the court.

Nor do we doubt that it was the object of the voyage to trade with the enemy, and for that purpose that the owners of the vessel and cargo intended to violate the blockade. The excuse offered by the master for the position in which the vessel was found—that she had been injured by stress of weather, and he was approaching the coast with no other motive than that of seeking shelter to repair the damage—is inconsistent with various facts developed by the evidence.

In the first place, the papers of the vessel purport that she was consigned to one San Roman, at Matamoras, but the instructions from the owners of both vessel and cargo show that this consignment was colorable, and that the master was the real consignee. He was clothed with full authority to dispose of the goods on board, and to invest the proceeds in what is very mysteriously termed *the article*, which they had mentioned to him *verbally*. The article to which allusion is thus made, was cotton, which it was undoubtedly the object of the voyage to procure.

In the second place, the articles which composed the cargo were as abundant and cheap at Matamoras as at Campeachy, whilst they were in great demand and of high price in the country occupied by the enemy.

In the third place, the vessel had on board, ostensibly as a passenger, but under a fictitious name, an Englishman, who was a pilot, and a resident of Lavacca, a town at the head of Matagorda Bay, for which the vessel was evidently directing her course when captured.

Besides these considerations, which are sufficient of themselves to justify the conclusion that a violation of the blockade was in the original intention of the owners of vessel and cargo before the vessel sailed from Campeachy, it was admitted by the master at the time of the capture that it was his purpose to run the blockade, and that he had before attempted, without success, to do so at St. Louis Pass. The Englishman on board, who joined the vessel at Campeachy, also stated that he was engaged to act as pilot of the vessel to enter Matagorda Bay, or any other convenient port of Texas.

The blockade of the coast of Texas had been established long before the vessel sailed from Campeachy, and its existence was generally known. It is proved that it was known to the owners and master of the captured vessel.

There is another circumstance which may be adverted to in this connection. The master of this vessel was also the master of the Sea Witch, which was captured off the coast of Texas for an attempt to violate the blockade, and was released upon the ground, that whilst on a voyage from Matamoras to New Orleans she was driven out of her course by stress of weather and injuries received—an excuse similar to the one offered in this case.* This circumstance the court will take notice of, and it will justify a rigid scrutiny into the character of the exculpating testimony produced by the master in the present case. Such is the language of the adjudged cases.†

The statement of the master as to the extent of injuries which the vessel had received is not supported by the log-book. The injuries which are shown by its entries were not of a very serious character—such as would endanger the safety of the vessel. Much less do the entries show the necessity of any deviation of the vessel from a direct course to Matamoras. The statement is, that she deviated from such course on the third day out from Campeachy, because the sea and wind were heavy, and the rigging of the vessel had been damaged. The log-book shows that the damage was repaired the following morning, and on the next day that the wind was fair for sailing in a direct course to Matamoras, and so continued nearly all the time up to the capture.

It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable

* 6 Wallace, 242.

† The Juffrouw Elbrecht, 1 Robinson, 127; The Experiment, 8 Wheaton, 261.

doubt. "Nothing less," says Sir William Scott, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretences of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose.

The decree of the court below must be REVERSED, and that court directed to enter a decree condemning the vessel and cargo as lawful prize; and it is

SO ORDERED.

KELLOGG v. UNITED STATES.

An officer of the United States, under authority of Congress, made a contract with D. and S., by which they agreed to furnish bricks to the government. The contract contained a clause that D. and S. should not sub-let or assign it. D. and S. having abandoned the contract, it was taken up, with the consent of the officer representing the government, by M. and A., the sureties of D. and S. to the government for its performance. M. and A. then entered into a contract with K., by which *he* undertook to perform the contract and to receive payment therefor from the United States at the contract price, and to pay over to M. and A. a certain percentage of the amount received, M. and A. constituting him, at the same time, their *attorney* to furnish the bricks and to receive payment. The government, desiring to abandon their enterprise, proposed to *all* parties respectively *interested on account of their contract*, &c., that if they would cancel it, the United States would settle with them "on the principles of justice and equity" all damages, &c., incurred by them. *Held*, that K. was not a party to, nor interested in the contract.

APPEAL from the Court of Claims.

By an act of March 3d, 1853, Congress authorized the commencement of an aqueduct to supply Washington with water. Captain Meigs was appointed to superintend the work.

In January, 1854, Captain Meigs, on behalf of the United

States, entered into a contract with Degges & Smith, by which they agreed to furnish for the work a certain number of bricks, for which the United States agreed to pay at a specified rate per thousand. To secure performance, Degges & Smith gave bond, with Mechlin & Alexander as sureties.

The contract between Captain Meigs and Degges & Smith contained a provision *that neither the contract, nor any part of it, should be "sub-let or assigned."*

In March, 1855, Congress having appropriated a certain sum for continuing the work, Captain Meigs gave notice to Degges & Smith, and also to their sureties, Mechlin & Alexander, that there would be required for the work of that season, a portion of the bricks. To this notice Degges & Smith made no response, but abandoned their undertaking, and failed to comply with their contract.

Degges & Smith having thus made default, Mechlin & Alexander, in order to save themselves from prosecution on their bond, entered into an arrangement with Captain Meigs, by which *they* assumed the contract which had been made with Degges & Smith.

Mechlin & Alexander, accordingly, made preparations for the manufacture of the bricks necessary to fulfil their contract; but before completing their arrangements, *they*, in March, 1856, entered into a contract with one Kellogg, by which *he* undertook to furnish all the bricks required, and to receive payment therefor from the United States at the contract price, and to pay over to Mechlin & Alexander, 5 per cent. of the amount so received; and Mechlin & Alexander by deed constituted him *their lawful attorney to furnish the bricks, and to receive payment therefor.*

Kellogg continued to furnish bricks, *as the agent of Mechlin & Alexander*, during the summer of 1856, until what remained of the appropriations for the building of the aqueduct was exhausted, when he received notice from Captain Meigs not to make or deliver any more.

On the 3d of March, Congress passed a joint resolution, containing a proposition to "*all parties respectively interested on account of their contract* for manufacturing bricks for the

Washington aqueduct," that, if they would cancel it, the United States would settle with them, "on the principles of justice and equity, all damages, losses, and liabilities incurred by said parties respectively on account of their contract."

After the passage of this resolution, Mechlin & Alexander, and Kellogg, also accepted the proposition, and cancelled the contract.

Upon this, the Secretary of the Treasury proceeded to make the settlement contemplated by said joint resolution, and awarded to Mechlin & Alexander, *as the only persons included in the provisions of the resolution*, $29,534. Of the sum so awarded by the secretary to Mechlin & Alexander, Kellogg, accepting it under protest, received $10,476, as the amount he was entitled to receive under his contract with Mechlin & Alexander.

Kellogg now filed his petition in the court below, setting forth the facts above stated, and insisting that the award of the said sum of money to Mechlin & Alexander, and the exclusion of him from the benefits of the resolution by the secretary, was erroneous, and contrary to the intent of the resolution; and that the secretary should have awarded him, as the amount he was entitled to receive under the resolution, as "a party interested in said contract," the sum of $62,692; to recover which sum and interest, amounting in all to $91,389, the suit was instituted.

To this petition the United States demurred; and the demurrer having been sustained by the Court of Claims and the petition dismissed, the case was now here on appeal.

Messrs. Carlisle and McPherson, for the claimant, Kellogg.

Mr. Talbot, contra.

Mr. Justice GRIER delivered the opinion of the court.

The case, well stated by the reporter, sufficiently demonstrates that there was no error in the decision of the Court of Claims sustaining the demurrer to the plaintiff's petition.

Syllabus.

The claimant has not shown that he was ever known or recognized by the United States as one of the parties to, or as interested in, the contract made by Captain Meigs, on behalf of the United States, for furnishing bricks for the construction of the Washington aqueduct. That contract provides that it should not be sub-let or assigned.

The petition shows that the claimant was acting under a contract with Mechlin & Alexander (who were the sureties for the fulfilment of the contract of Degges & Smith), and not under a contract with the United States, and was recognized only as agent, attorney-in-fact, or *employé* of the sureties; and that under the resolution of Congress, approved March 3d, 1857, by which the Secretary of the Treasury was authorized to settle with all the parties, respectively, in the *contract*, the claimant was not included, because he was no party to it either originally or by substitution.

The award made by the Secretary of the Treasury, and the payment of the money under it, were in strict accordance with the provisions of the resolution. The secretary properly declined to settle the account between Mechlin & Alexander as to how the money so paid should be divided between them and their agent. Of this sum the petitioner received $10,476, which he accepted, "under protest;"—which could only mean saving his right to importune Congress or the Court of Claims for *more*. This has occasionally proved a valuable privilege. But something more is necessary to recover in a court of justice.

JUDGMENT AFFIRMED.

EX PARTE BRADLEY.

1. The Supreme Court of the District of Columbia, as organized by the act of March 3, 1863, is a different court from the criminal court as fixed by the same act, though the latter court is held by a judge of the former. Hence the former court has no power to disbar an attorney for a contempt of the latter.
2. An attorney cannot be disbarred for misbehavior in his office of an attorney generally, upon the return of a rule issued against him for con-

Statement of the case.

tempt of court, and without opportunity of defence or explanation to the first-named charge.

3. Mandamus lies from this court to an inferior court to restore an attorney-at-law disbarred by the latter court when it had no jurisdiction in the matter, as (*ex. gr.*) for a contempt committed by him before another court.

THIS case arose out of a petition by Joseph H. Bradley, Esq., to this court for the writ of *mandamus*, directed to the Supreme Court of the District of Columbia, to restore him to the office of attorney and counsellor in said court, from which he alleged that he had been wrongfully removed by it on the 9th of November, 1867.

It appeared that the said "*Supreme* Court of the District of Columbia" had issued a rule against Mr. Bradley, reciting certain offensive language which it alleged had been used by Mr. Bradley, at the previous June Term of the "*criminal* court," to Mr. Justice Fisher, presiding justice, pending a trial there for murder, and for which language the said justice; on the 10th August, entered a judgment ordering the name of Mr. Bradley to "be stricken from the rolls of attorneys practising in *this* court." The rule of the Supreme Court referred, also, to certain alleged conduct of Mr. Bradley at the time that Judge Fisher announced the order disbarring him in the criminal court, and to a certain letter previously delivered to that judge, who had been holding the said court, and it concluded in these words:

"And the said conduct requiring, in our opinion, investigation by *this* court, it is therefore ordered, that said Joseph H. Bradley show cause, on or before the fourth day of November next, why he should not be punished *for contempt* of *this* court by reason of said offensive conduct and language towards one of its members, and relating to the official acts of the said justice."

To this rule Mr. Bradley made a return, in which, after expressing his satisfaction at the opportunity afforded him by it to present his statement and version of the facts involved in the investigation, and thus "to purge himself from any intentional disrespect, contumely, or contempt towards

the court, or any member thereof, in the transaction referred to," he set up as one reply, among others, that the Supreme Court had "no power, authority, or jurisdiction to punish for an alleged contempt committed in *another forum.*"

It will be seen from this return of Mr. Bradley's to the rule of the Supreme Court of the District issued against him, that his defence turned, so far as respected this point, upon the question whether there was, or was not, a criminal court in the District as distinguished from its Supreme Court; a matter depending on a history and upon statutes which are now set forth:

By an act passed in 1801,* there was organized for the District the "Circuit Court of the District of Columbia, vested with all the powers of the circuit courts of the United States." It had "cognizance of all *crimes and offences* committed within said District, and of all cases in law and equity," &c.

By act of 1802,† it was provided that the chief judge of the District of Columbia should hold a District Court in and for the said District, "which court shall have and exercise within said District the same powers and jurisdiction which are by law vested in the district courts of the United States."

Thus stood the jurisdiction, until the passage of an act, July 7, 1838,‡ "to establish a criminal court in the District of Columbia," for the trial of all causes and offences committed in the District. This act provided that "the said criminal court shall have jurisdiction now held by the Circuit Court for the trial and punishment of all crimes and offences, and the recovery of all fines and forfeitures and recognizances."

It provided also for a writ of error from the Circuit Court, or any judge thereof, in any criminal case wherein final judgment had been pronounced by the "criminal court" convicting any person of any crime or misdemeanor.

It was further provided, by an amendment of 20th of February, 1839,§ that the judge of the criminal court "shall be

* 2 Stat. at Large, 105. † Ib. 166. ‡ 5 Id. 306. § Ib. 320.

authorized to make all needful rules of practice, and *to provide a seal for said court;* and also that in any case where the party might be related to the judge of the criminal court, then the case and the record thereof should be sent to the Circuit Court of the District, to be there tried and determined, as if this act and the act to which it is supplemental had never been passed."

Thus things stood till the 3d March, 1863,* when by act of that date the courts of the District were reorganized.

The first section of that organic act established a court, to be called the Supreme Court of the District of Columbia, which shall have *general jurisdiction in law and equity*, and consist of four justices, one of which shall be chief justice.

The third section provided that the Supreme Court should possess the same powers and exercise the same jurisdiction as was then possessed and exercised by the Circuit Court of the District of Columbia.

The justices of the court (the act proceeds) shall severally possess and exercise the jurisdiction now possessed and exercised by the judges of the said Circuit Court. Any one of them may hold the District Court of the United States for the District of Columbia, in the manner, and with the same powers and jurisdiction possessed and exercised by other district courts of the United States; and any one of the justices may also hold a *criminal court* for the trial of all crimes and offences arising within said district, *which court* shall possess the same powers and *exercise the same jurisdiction* now possessed and exercised by *the criminal court* of the District.

The fifth section provided that general terms of the said Supreme Court should be held at the same times at which terms of the Circuit Court of the District of Columbia were then required to be held, and at the same place; and that district courts and *criminal courts* should also be held by one of said justices at the several times when such courts were then required to be held, and at the same place.

The sixth section provided that the Supreme Court might

* 12 Stat. at Large, 762.

establish such rules as it might deem necessary for the regulation of the practice of the several courts organized by the act.

The thirteenth, that all suits and proceedings which, at the time the act should take effect, should be pending in any of the courts thereby abolished, should be transferred to the courts to be established under the provisions of the act, and might be prosecuted therein with the same effect as they might have been in the court in which the same were commenced.

The sixteenth, that the circuit, district, and criminal courts of the District of Columbia were thereby abolished, and that all laws and parts of laws relating to said courts, so far as the same were applicable to the courts created by this act, were thereby continued in force in respect to such courts, &c.

The Supreme Court of the District, having heard argument in support of the return made by Mr. Bradley, entered its final order to its rule as follows:

IN THE MATTER OF JOSEPH H. BRADLEY, SR.

Contempt of Court.

"Mr. Bradley having filed his answer to the rule of the court served on him, and having been heard at the bar in support of his answer, it is by the court ordered that, for the causes set forth in said rule, the name of Mr. Bradley be stricken from the roll of attorneys, solicitors, &c., authorized to practice in *this* court."

After the order thus made, this court (the Supreme Court of the United States), on the petition of Mr. Bradley and motion of Mr. Carlisle, granted a rule on the Supreme Court of the District requiring them to show cause why a mandamus should not issue for Mr. Bradley's restoration.

To the last-mentioned rule of this court, the Supreme Court of the District made return—

1. "That on the 10th of August, 1867, while Judge Fisher, one of the justices of the Supreme Court, was holding a criminal court in this district, the relator had been guilty

of contemptuous language towards the said judge in the progress of a trial therein, and for which the said justice disbarred him from the privileges of attorney and counsellor of the Supreme Court."

The return added:

"At the time the contempt was given, Judge Fisher was holding a Supreme Court, and exercising its criminal jurisdiction as such Supreme Court. There is no criminal court in this district; there is, therefore, no judge of a criminal court in this District. The act of 3d March, 1863, abolished both the circuit and criminal courts of the District of Columbia, and transferred all their several powers and jurisdictions to the Supreme Court created to take their place. It prescribes in what manner said Supreme Court shall exercise those powers and jurisdictions. One of the justices shall hold a criminal court, another a circuit court, a third the special term, and a fourth a district court. Or any one of the justices may, at the same time, hold two or more of these courts. But these several justices, when holding courts in this manner, have no authority or jurisdiction of their own, for the law has given them none. Their powers and jurisdiction are those of the 'Supreme Court;' and these it is which make a court. The court where the powers and jurisdiction of the Supreme Court of the District of Columbia are exercised, is that court. The Supreme Court of the District holds the criminal court, and the law makes one judge the court for that purpose. The contempt in question was, therefore, a contempt of the authority of the Supreme Court."

2. That "the conduct of Mr. Bradley was not merely a contempt of the authority of the Supreme Court of this district, but was also gross misbehavior *in his office of attorney*, and that for this reason also, his offence was cognizable by the court in general term, irrespective of the doctrine of contempts."

The return proceeded:

"It is true that the rule to show cause, ordered against him by the court in general term, ignored the order made by Judge Fisher, and called upon him to answer for the specified acts as a contempt; yet, after his return was made, the court, as it had

the right to do, considered his offence in both these aspects, and 'ordered, that *for the causes set forth in said rule*, the name of Mr. Bradley be stricken from the roll of attorneys, solicitors, &c., authorized to practice in this court.'"

3. "Because Mr. Bradley was removed only after due notice had been served upon him, and he had been heard in defence, and after mature consideration by the court. That the said order of the court was a judgment of the court in regard to a matter *within its own exclusive jurisdiction, and not subject to review in any other court;* and especially not in this form of proceeding."

The case was elaborately argued by Mr. P. Phillips (with whom was Mr. Carlisle) for the relator. No counsel appeared in behalf of the Supreme Court of the District, which rested on its return; a document in form argumentative.

Mr. Justice NELSON delivered the opinion of the court.

One of the grounds set up in the return to the rule to show cause is, that on the 10th of August, 1867, while Judge Fisher, one of the justices of the Supreme Court, was holding a criminal court in this district, the relator had been guilty of contemptuous language towards the said judge in the progress of a trial therein, and for which the said justice disbarred him from the privileges of attorney and counsellor of the Supreme Court. That, at the time of the committing of the contempt, Judge Fisher was holding, not a criminal, but a Supreme Court, and exercising its criminal jurisdiction as such; that there is no criminal court in this district, and, therefore, no judge of a criminal court; and that the contempt committed before the judge was a contempt of the Supreme Court. That the act of March 3d, 1863, abolished both the circuit and criminal courts of the district, and conferred all their powers and jurisdiction upon the Supreme Court created by the act.

We think a reference to this act of March 3d, 1863, reorganizing the courts in this district, will show that this is an erroneous construction. It will be seen, by reference to

this organic act, that the new Supreme Court of this district has conferred upon it only the same powers and jurisdiction as was possessed by the circuit court just abolished. This circuit court possessed, at the time, no original criminal jurisdiction whatever, nor had it, since the 7th of July, 1838; for an act of that date established a criminal court, upon which was conferred all the criminal jurisdiction of the district.

A writ of error lies from the circuit court to this criminal court, and, doubtless, does from the present Supreme Court to the criminal court of the district.

The circuit court had originally been invested with all the powers of a district court of the United States; but these were taken from it in 1802, and a district court established within the district, to be held by the chief justice of the circuit court. These courts, the district and criminal, are preserved by the act of 1863 reorganizing the courts, and are to be held in the same manner, and with the same powers and jurisdiction,—the one as possessed by the district courts of the United States, and the other as possessed by the old criminal court of the district. The only change made is, that instead of each court having a judge or judges appointed to hold it, any justice of the Supreme Court may hold the same. Under the old law, 20th of February, 1839, in case of the inability of the judge of the criminal court to hold the same, one of the judges of the circuit was authorized to hold it.

It is plain, therefore, that, according to a true construction of the act of 1863, reorganizing the courts of this district, the Supreme Court not only possesses no jurisdiction in criminal cases, except in an appellate form, but that there is established a separate and independent court, invested with all the criminal jurisdiction, to hear and punish crimes and offences within the district. And, hence, one of the grounds, if not the principal one, upon which the return places the right and power to disbar the relator, fails; for we do not understand the judges of the court below as contending that, if Judge Fisher, at the time of the conduct and words spoken by the relator before him, or in his pres-

ence, was not holding the Supreme Court of the district, but was holding a court distinct from the Supreme Court, that they possessed any power or jurisdiction over the subject of this contempt as complained of, otherwise the case would present the anomalous proceeding of one court taking cognizance of an alleged contempt committed before and against another court, which possessed ample powers itself to take care of its own dignity and punish the offender. Under such circumstances, and in this posture of the case, it is plain that no authority or power existed in the Supreme Court to punish for the contempt thus committed, even without reference to the act of Congress of 1831,* which in express terms restricts the power, except for "misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice."

Another ground relied on in the return for disbarring the relator is, that his conduct was not merely a contempt of the authority of the Supreme Court, but was, also, gross misbehavior in his office as an attorney generally, and that, for this reason also, his offence was cognizable by the court in general term, and punishable irrespective of the doctrine of contempts. The judges admit that the rule to show cause ordered against him at the general term, ignored the order made by Judge Fisher disbarring the relator, and called upon him to answer simply for the act and conduct specified as for a contempt; yet they insist that, after the return of the relator to the rule in answering the contempt, they had a right, in considering the answer, if any other offence appeared therein cognizable by the court, it was competent to take notice of it, and inflict punishment accordingly.

We cannot assent to this view. It assumes the broad proposition, that the attorney may be called upon to answer an offence specified, and, when the answer comes in, without any further notice or opportunity of defence or explanation, punish him for another and distinct offence. Certainly no argument can be necessary to refute such a proposition.

* § 1.

It violates the commonest and most familiar principles of criminal jurisprudence. It is true, where a contempt is committed in the presence of the court, no other notice is usually necessary; but a proceeding to punish an attorney generally for misbehavior in his office, or for any particular instance of misbehavior, stands on very different ground. The rule to show cause is in the record. After reciting the offensive language and conduct complained of (all of which occurred before Judge Fisher), it concludes in these words: "And said conduct and language requiring, in our opinion, investigation by this court, it is therefore ordered, that said Joseph H. Bradley show cause, on or before the fourth day of November next, why he should not be punished for contempt of this court by reason of said offensive conduct and language towards one of its members, and relating to the official acts of the said justice." It will be seen that the offence charged against the relator, and for which he was called upon to answer, was direct and specific, one well known to the law and the proceedings of courts,—a contempt of the Supreme Court. And the offence being thus specified, he was fully advised of the matters against which he was called upon to defend, and enabled to prepare his defence accordingly. That the relator so understood the charge is apparent from his answer, in which he expresses his satisfaction at the opportunity afforded him to present to the court his account of the facts involved in the case, and "to purge himself from any intentional disrespect, contumely, or contempt towards the court, or any member thereof, in the transactions referred to."

The order entered on the minutes of the court, after the answer to the rule to show cause, inflicting the punishment, confirms this view. It is found in the record, and is headed as follows:

"*In the matter of Joseph H. Bradley, Sr.—Contempt of court.*"

"Mr. Bradley having filed his answer to the rule of court served on him, and having been heard at the bar in support of his answer, it is by the court ordered, that for the causes

set forth in said rule, the name of Mr. Bradley be stricken from the roll of attorneys, solicitors, &c., authorized to practice in this court."

The order, or judgment, seems to be in strict conformity to the offence charged in the rule to show cause, namely, for contempt of court.

We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein. If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice; in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. Indeed, in every instance where an attorney is charged by affidavit with fraud or malpractice in his profession, contrary to the principles of justice and common honesty, the court, on motion, will order him to appear and answer, and deal with him according as the facts may appear in the case. But, this is a distinct head of proceeding from that of contempt of court, or of the members thereof, committed in open court, or in immediate view and presence, tending to interrupt its proceedings, or to impair the respect due to its authority. This distinction is recognized in the act of 1831, already referred to, which, after providing for personal contempt in presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for "the misbehavior of the officers of said courts in their official transactions."

Without pursuing this branch of the case further, our conclusion is—

First. That the judges of the court below exceeded their authority in punishing the relator for a contempt of that court on account of contemptuous conduct and language before the Criminal Court of the District, or in the presence of the judge of the same.

Second. That they possessed no power to punish him, upon an ex parte proceeding, without notice or opportunity of defence or explanation for misbehavior, or for any particular instance of the same generally in his office as attorney of the court, as claimed in the words of the return, "irrespective of the doctrine of contempts."

The only remaining question is, whether or not a writ of mandamus from this court is the appropriate remedy for the wrong complained of. This question has already been answered by Chief Justice Marshall, who delivered the opinion of the court in *Ex parte Crane.** That was an application for a mandamus to the Circuit Court of the United States for the Southern District of New York, commanding the court to review the settlement of several bills of exceptions. The learned Chief Justice observes: "A doubt has been suggested respecting the power of the court to issue the writ. The question was not discussed at the bar, but has been considered by the judges. It is proper," he observes, "that it should be settled, and the opinion of the court announced. We have determined that the power exists." He then refers to the definition and office of the writ as known to the common law in England, and to the language of Blackstone in speaking of it, as follows: "That it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening their negligence, and obviating the denial of justice." The Chief Justice then refers to the 13th section of the judicial act, which enacts that the Supreme Court shall have power to issue writs of prohibition to the District Courts when proceeding

* 5 Peters, 190

as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding offices under the authority of the United States. "A mandamus to an officer," he observes, "is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction."

Two of the judges dissented, and one of them, Mr. Justice Baldwin, delivered an elaborate opinion adverse to the decision, in which every objection to the jurisdiction is very forcibly stated. Since this decision the question has been regarded at rest, as will be seen from many cases in our reports, to some of which we have referred.*

This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right, without any existing legal remedy. It is upon this ground that the remedy has been applied from an early day, indeed, since the organization of courts and the admission of attorneys to practice therein down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress. The attorney or counsellor, disbarred from caprice, prejudice, or passion, and thus suddenly deprived of the only means of an honorable support of himself and family, upon the contrary doctrine contended for, would be utterly remediless.

It is true that this remedy, even, when liberally expounded, affords a far less effectual security to the occupation of attor-

* Ex parte Bradstreet, 7 Peters, 634; Insurance Company v. Wilson's Heirs, 8 Id. 291; Stafford v. Union Bank, 17 Howard, 275; United States v. Gomez, 8 Wallace, 758.

ney than is extended to that of every other class in the community. For we agree that this writ does not lie to control the judicial discretion of the judge or court; and hence, where the act complained of rested in the exercise of this discretion, the remedy fails.

But this discretion is not unlimited, for if it be exercised with manifest injustice, the Court of King's Bench will command its due exercise.* It must be a sound discretion, and according to law. As said by Chief Justice Taney, in *Ex parte Secombe*,† "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility." And by Chief Justice Marshall, in *Ex parte Burr*:‡ "The court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper."

We are not concerned, however, to examine in the present case how far this court would inquire into any irregularities or excesses of the court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. Whatever views may be entertained concerning it, they are wholly immaterial and unimportant here. The ground of our decision upon this branch of the case is, that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. The contrary must be maintained before this order can be upheld and the writ of mandamus denied. No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void. Now, this want of jurisdiction of the inferior court in a summary proceeding to remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen, from the definition and office of it, that it is issued to the inferior courts "to enforce the due exercise of those judicial

* Tapping on Mandamus, 13, 14. † 19 Howard, 13. ‡ 9 Wheaton, 530.

or ministerial powers with which the crown or legislature have invested them; and this, not only by restraining *their excesses*, but also by quickening their negligence and obviating their denial of justice."* The same principle is also found stated with more fulness in Bacon's Abridgment, title "Mandamus,"† "to restrain them (inferior courts) within their bounds, and compel them to execute their jurisdiction, whether such jurisdiction arises by charter, &c., being in *subsidium justiciæ*."‡

The same principle is also stated by Chief Justice Marshall in *Ex parte Burr*. "There is then," he observes, "no irregularity in the mode of proceeding which would justify the interposition of this court. It could only interpose on the ground that the Circuit Court had clearly exceeded its powers, or, had decided erroneously on the testimony." The case of Burr was malpractice and stirring up litigation, to the disturbance and oppression of the community. The jurisdiction was unquestionable. So in *Ex parte Secombe*, Chief Justice Taney, after showing that the question was one of judicial discretion, observes, "We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or amend its decision, when the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion." The case of Secombe was for a contempt in open court, and the jurisdiction undoubted. So was the case of *Tillinghast* v. *Conkling*, referred to by the Chief Justice in his opinion. This writ has been issued in numerous cases by the King's Bench, in England, to inferior courts to restore attorneys wrongfully removed. The cases are collected by Mr. Tapping.§ One of them was the case of an attorney suspended from practicing in the courts of the county palatine of Chester. The reason given for issuing this writ is, that the office is of

* 3 Blackstone's Com. 111. † Letter D., p. 273.

‡ See also Bacon, letter E., p. 278; and Tapping on Mandamus, p. 105, and the cases there cited.

§ On Mandamus, 44.

public concern, and regards the administration of justice; and because there is no other remedy.*

Cases are found also in many of the courts of the States. Among the more recent are three cases in California;† in New York;‡ in Pennsylvania, Virginia, and Alabama. In several of the cases the remedy failed, as in *Ex parte Burr*, *Secombe*, and *Tillinghast*, the court having held, in the cases, that the questions involved were of judicial discretion. But the proceeding is admitted to be the recognized remedy when the case is outside of the exercise of this discretion, and is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction.

It will be seen that this opinion is wholly irrespective of the merits of this unhappy controversy between the relator and Judge Fisher, as the view we have taken of the case does not in any respect involve this question. We can only regret the controversy, as between gentlemen of the highest respectability and honor, and express the hope that reflection, forbearance, and the generous impulses that eminently belong to the members of their profession, may lead to their natural fruits,—reconciliation and mutual and fraternal regard.

Our conclusion is, that a peremptory writ of

MANDAMUS MUST ISSUE.

Mr. Justice MILLER, dissenting.

I am of opinion that this court has no jurisdiction of the case in which it has just ordered the writ of mandamus to issue.

There are in the reports of our decisions three applications before this for the writ of mandamus to be issued by this court to restore attorneys to places at the bar from which they had been expelled by Federal courts. The first of these is

* White's case, 6 Modern, 18, per Holt; Leigh's case, 3 Id. 335; S. C. Carthew, 169, 170.

† People v. Turner, 1 California, 143, 188, 190.

‡ People v. Justices, 1 Johnson's Cases, 181.

the case of Burr.* The opinion delivered by Chief Justice Marshall expresses great doubt on the part of the court as to its right to interfere, and resting mainly on that doubt, and partly on the fact that the exclusion from practice was temporary, and would soon expire, the application was refused.

In the other two cases, namely, *Tillinghast* v. *Conkling*, and *Ex parte Secombe*, the application was denied, and the denial placed explicitly on the ground that this court has no power to revise the decisions of the inferior courts on this subject by writ of mandamus.†

In delivering the opinion of the court in the latter case, Chief Justice Taney said, that "in the case of *Tillinghast* v. *Conkling*, which came before this court at the January Term, 1827, a similar motion was overruled. The case is not reported, but a brief written opinion remains in the files of the court, in which the court says that the motion is overruled upon the ground that it had not jurisdiction of the case." In the principal case the court said: "It is not necessary to inquire whether this decision of the Territorial court (disbarring Secombe) can be revised here in any other form of proceeding. The court are of opinion that he is not entitled to a remedy by mandamus. . . It cannot be reviewed or reversed in this form of proceeding, however erroneous it may be, or supposed to be. And we are not aware of any case where a mandamus was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature judicial, and within the scope of its jurisdiction and discretion."

The attempt to distinguish the case now under consideration from those just cited, on the ground that in the present case the Supreme Court of the District of Columbia was acting without jurisdiction, is in my judgment equally without foundation in the fact asserted, and in the law of the case if the fact existed.

1. That court had jurisdiction of the person of Mr. Bradley, because he was a resident of the District of Columbia, and

* 9 Wheaton, 529.

† 19 Howard, 9.

because he received notice of the proceeding, and submitted himself to the court by depending on the merits.

2. It had jurisdiction of the offence charged, namely, a contempt of the court whose judgment we are reviewing. I say this *advisedly*, because the notice which called upon him to answer charged him in distinct terms with a contempt of the Supreme Court of the District, though much of the argument of counsel goes upon the hypothesis that the offence for which he was disbarred was an offence against the Criminal Court, and not the Supreme Court.

3. That court had undoubted authority to punish contempt by expelling the guilty party from its bar.

If the court had jurisdiction of the party and of the offence charged, and had a right to punish such offence by the judgment which was rendered in this case, what element of jurisdiction is wanting?

But if we concede that the Supreme Court of the District exceeded its authority in this case, I know of no act of Congress, nor any principle established by previous decisions of this court, which authorizes us to interfere by writ of mandamus. The argument in favor of such authority is derived from the analogy supposed to exist between the present case and others in which the court has held that the writ may be issued in aid of its appellate jurisdiction, as *Ex parte Crane*,* *Ex parte Hoyt*,† and by the practice in the Court of King's Bench, in England, and in some of our State courts.

In regard to the practice in the King's Bench and in the State courts, I shall attempt to show presently that this court possesses no such general supervisory power over inferior Federal courts as belongs to the King's Bench, and as belongs generally to the appellate tribunals of the States. The appellate power of this court is strictly limited to cases provided for by act of Congress.

The case of Crane† was one which this court had an undoubted right to review. It was alleged that this right was obstructed by the refusal of the judge of the Circuit Court

* 5 Peters, 193. † 13 Id. 291. ‡ 5 Id. 190.

to sign a bill of exceptions, and the court held that in such a case he might be compelled, by the writ of mandamus, to sign a truthful and proper bill of exceptions.

It was not necessary to cite this case and others, in which the court *refused* to grant the writ of mandamus, to show that under proper circumstances it may issue. In *Ex parte Milwaukee Railroad Company** the court ordered a writ of mandamus to issue to the judges of the Circuit Court, because, in the language of the court, "the petitioner has presented a case calling for the exercise of the supervisory power of this court over the Circuit Court, which can only be made effectual by a writ of mandamus." And this is the true doctrine on which the use of the writ is founded; and the sound construction of the 13th section of the Judiciary Act.

The case of Hoyt,† cited by counsel for petitioner, is in strong confirmation of this. Referring to the language of that section the court says, "The present application is not warranted by any such principles and usages of law. It is neither more nor less than an application for an order to reverse the solemn judgment of the district judge in a matter clearly within the jurisdiction of the court, and to substitute another judgment in its stead." Precisely what is asked in the present case.

The case of Tobias Watkins‡ is very analogous to the one before us, and in construing the power of this court in regard to the writ of *habeas corpus*, decides principles which appear to me to be in direct conflict with the views advanced by the court in the opinion just read. In that case, Watkins had been indicted, tried, and sentenced to imprisonment by the Circuit Court of the District of Columbia. An application was made to this court for a writ of *habeas corpus*, on the ground that the indictment charged no offence of which that court had cognizance. But, conceding this to be true, and answering the case made by the petition, the court, by Marshall, C. J., asks: "With what propriety can this court look

* 5 Wallace, 825. † 18 Peters, 291. ‡ 3 Ib. 193.

into the indictment? We have no power," he says, "to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment, which the law has placed beyond our reach. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it cannot be a nullity if the court has general jurisdiction of the subject, although it be erroneous." "The law trusts that court with the whole subject, and has not confided to this court any power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of *habeas corpus*." And, finally, after examining the cases in which this court had previously issued the writ of *habeas corpus*, he says that they are "no authority for inquiring into the judgments of a court of general criminal jurisdiction, and regarding them as nullities, if, in our opinion, the court has misconstrued the law, and has pronounced an offence to be punishable criminally, which we may think is not."

The case made by Mr. Bradley is much weaker than the case of Watkins, because, in the latter, the court was only asked to determine, on the face of the indictment, whether the offence charged was cognizable by the Circuit Court. Here the charge of a contempt, of which the court below had jurisdiction, is clear; but we are told that, on looking into the testimony, we shall find that the petitioner was not guilty of a contempt of that court, but of another court. Judge Marshall and the court over which he presided refused to look beyond the judgment, even at the indictment. Here the court looks beyond the judgment, and beyond the notice which charges the offence, and inquires into the evidence on which the party is convicted; and because that is, in the opinion of this court, insufficient, it is held that the court which tried the case had no jurisdiction. This is to me a new and dangerous test of jurisdiction.

But with all due respect to my brethren of the majority of the court, it seems to me that their judgment in this case is not only unsupported by the cases relied on, and in conflict

with the cases of Tillinghast and Secombe, decided by this court directly on the same point, but it is at war with the settled doctrine of the court on the general subject of its appellate jurisdiction.

The Constitution* declares that the appellate power of this court is subject to such exceptions, and is to be exercised under such regulations as Congress shall make.

Chief Justice Ellsworth, construing this clause of the Constitution, in the case of *Wiscart* v. *Dauchy*,† said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." And the court afterwards, by Chief Justice Marshall, said in substance, that if Congress in establishing the Supreme Court, had not described its jurisdiction, its general power in reviewing the decisions of other Federal courts could not be denied. But the fact that Congress had described its jurisdiction by affirmative language, must be understood as a regulation under the Constitution, prohibiting the exercise of other powers than those described.‡

In *United States* v. *Nourse*,§ a case of summary proceedings before the district judge under the revenue law, which provided that an appeal might be allowed to claimant by a judge of the Supreme Court, it was said that, "as this special mode is pointed out by which an appeal may be taken, it negatives the right of an appeal in any other manner;" and it was further said that the United States had no right of appeal, because none was given by the act which authorized the proceeding.

And finally, in the case of *Barry* v. *Mercein*,‖ this court, by Chief Justice Taney, declared emphatically that, "by the Constitution of the United States the Supreme Court possesses no appellate power in any case unless conferred upon it by act of Congress; nor can it be exercised in any other

* Art. III, § 2. † 3 Dallas, 321.

‡ United States v. More, 3 Cranch, 159; Durousseau v. United States, 6 Id. 307.

§ 6 Peters, 470. ‖ 5 Howard, 103.

mode of proceeding than that which the law prescribes." This case and the case of *United States* v. *Moore* were decided in direct reference to the jurisdiction of this court over those of the District of Columbia; and in the latter, Judge Marshall uses this unmistakable language: "This court, therefore, will only review those judgments of the Circuit Court of Columbia, a power to re-examine which is expressly given by law."

Let us see, then, what regulations Congress has made in regard to our jurisdiction over the courts of the District of Columbia.

The Supreme Court of the District, whose judgment is attempted to be brought into review here, was established by the act of March 3, 1863. The only clause looking to a revision of the decisions of that court is section 11, which enacts "that any final judgment, order, or decree of said court may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as is now provided by law in reference to final judgments, orders, and decrees of the Circuit Court of the United States for the District of Columbia." The act on which our jurisdiction over this Circuit Court depended is that of February 27, 1801. The 8th section of that act provides that "any final judgment, order, or decree of said Circuit Court, wherein the matter in dispute shall exceed the value of one hundred dollars" (now one thousand), "may be re-examined and reversed or affirmed in the Supreme Court of the United States by writ of error or appeal."

Here then is no provision for any other modes of review than by appeal and by writ of error; but there is a limitation of the use of these modes to cases in which the matter in dispute shall exceed one thousand dollars. Where then is there any authority for a review by writ of mandamus? And where is there any regulation authorizing a review of this case by any mode whatever?

For the counsel of petitioner in this case does not claim that the matter in dispute exceeds a thousand dollars, or has

any moneyed value. Such a claim would be fatal to the relief he asks, because it would show that it is a proper case for a writ of error, and therefore a mandamus will not lie.

We have repeatedly held that the writ of mandamus cannot be made to perform the functions of a writ of error.

In the recent case of the *Commissioner* v. *Whiteley*,* the following language was used without dissent: "The principles of the law relating to the remedy by mandamus are well settled. It lies when there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. . . . . It lies when the exercise of judgment and discretion are involved, and the officer refuses to decide, *provided that if he decided, the aggrieved party could have his decision reviewed by another tribunal.* . . . It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error."

And to the same purpose are *Ex parte Hoyt*† and *Ex parte Taylor*.‡

Mr. Justice SWAYNE, not having heard the argument, took no part in the judgment.

RIDDLESBARGER *v.* HARTFORD INSURANCE COMPANY.

1. A condition in a policy of fire insurance that no action against the insurers, for the recovery of any claim upon the policy, shall be sustained, unless commenced within twelve months after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced, is not against the policy of the statute of limitations, and is valid.
2. The action mentioned in the condition which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case; although such previous action was commenced within the period prescribed.

ERROR to the Circuit Court for Missouri.

This was an action against the Hartford Insurance Com-

* 4 Wallace, 524. † 13 Peters, 279. ‡ 14 Howard, 8.

pany, upon a policy of insurance in the sum of five thousand dollars, issued by the said company, a corporation created under the laws of Connecticut, to the plaintiff, upon a brick building, belonging to him, situated in Kansas City, in the State of Missouri. The policy bore date on the first of June, 1861, and was for one year. The building was destroyed by fire in March, 1862, and in June following the plaintiff brought an action for the loss sustained in the Kansas City Court of Common Pleas, in the county of Jackson in that State. To this action the defendant appeared and answered to the merits, and the cause continued in that court until June, 1864, when it was dismissed by the plaintiff. Within one year after this dismissal the present action was commenced in the Court of Common Pleas in the County of St. Louis, from which it was transferred to the Circuit Court of the United States for the District of Missouri.

The policy contained the following condition:

"That no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of the said policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur, and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced."

To the present action the defendant pleaded this condition. The plaintiff replied the commencement of the first action in the Kansas City Court of Common Pleas within the year stipulated in the condition, and the commencement of the present action within one year after the dismissal of that action. To the replication the defendant demurred.

The statute of limitations of Missouri, after prescribing various periods of limitation for different actions, provides that if in any action commenced within the periods mentioned, the plaintiff shall "suffer a nonsuit," he may commence a new action within one year afterwards.

Argument for the party insured.

The Circuit Court sustained the demurrer, and rendered final judgment thereon for the defendant, and the plaintiff brought the case here by writ of error.

Mr. James Hughes, for the plaintiff in error.

I. Parties cannot by a contract agree upon a limitation different from the statutes within which suit shall be brought, or the right to sue be barred. This would be in conflict with the law and its policy. The point is so expressly ruled by McLean, J.,* and by the Supreme Court of Indiana which followed him.†

This is an attempt to bar or discharge a right of action before the right accrues. It is a well-settled principle, that a release can only operate upon an existing claim.‡

Why has a condition or agreement in a policy, providing that all disputes arising under it shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the courts.§

II. But if the limitation contract, as to the time of bringing the suit, is valid, and binds the plaintiff to commence his action within twelve months next after the loss occurred, then we insist that inasmuch as the plaintiff did commence his action against the defendant, within the time prescribed, viz., in June, 1862, in the Kansas City Court of Common Pleas, in Jackson County, Missouri, in which he sought to recover, for the same cause of action and none other, that he seeks to recover for in the present suit; to which action defendant appeared and filed an answer to the merits thereof; that said action was pending and undetermined in said court until June, 1864, when plaintiff suffered a nonsuit therein, and the present action was commenced in the St.

* French et al. v. Lafayette Insurance Company, 5 McLean, 463.

† Eagle Insurance Company v. Lafayette Insurance Company, 9 Indiana, 448.

‡ Coke Littleton, 265; Hastings v. Dickinson, 7 Massachusetts, 155; Gibson v. Gibson, 15 Id. 110.

§ Kill v. Hollister, 1 Wilson, 129; Allegre v. Insurance Company, 6 Harris & Johnson, 413.

Louis Court of Common Pleas, in July, 1864, within twelve months after the nonsuit was suffered; then plaintiff has complied with the condition in said contract according to, and in compliance with the then existing laws of Missouri, and is entitled to maintain the present action.*

The contract was made in the State of Missouri, and was made with reference to the then existing laws of that State.

That law became a part of the contract itself, and to that law we must look in giving a construction to the contract; and so far as the remedy is concerned, when suit is brought in that State to enforce a right growing out of that contract, the law of that State must alone govern and determine. The Revised Statutes of 1855 were in force when the contract was made, and so continued in force until after the commencement of this suit in the Common Pleas Court of St. Louis County.

The statute of limitations of that State enacts that actions of this kind shall be brought within five years next after the cause of action accrues, provided that if any action be commenced within the time prescribed, and the plaintiff therein "suffer a nonsuit," such plaintiff may commence a new action, within one year from the time of such nonsuit suffered.

Mr. R. D. Hubbard, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

By the demurrer to the replication two questions are presented for our determination: *First;* whether the condition against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid; and *Second;* whether if valid, the condition was complied with in the present case under the statute of limitations of Missouri.

The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the

* Haymaker v. Haymaker, 4 Ohio State, 272.

statute of limitations. This notion arises from a misconception of the nature and object of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims. It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid. The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible.

A stipulation in a policy to refer all disputes to arbitration stands upon a different footing. That is held invalid,

because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy. That is a very different matter from prescribing a period within which such resort shall be had. The condition in the policy in this case does not interfere with the authority of the courts; it simply exacts promptitude on the part of the assured in the prosecution of his legal remedies, in case a loss is sustained respecting which a controversy arises between the parties.

The statute of Missouri, which allows a party who "suffers a nonsuit" in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defect in the proofs, or in the parties or pleadings, and like particulars. In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also.

The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless *such* action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract.

The questions presented in this case, though new to this court, are not new to the country. The validity of the limitation stipulated in conditions similar to the one in the case at bar, has been elaborately considered in the highest courts of several of the States,* and has been sustained in all of

* Peoria Insurance Company v. Whitehill, 25 Illinois, 466; Williams v. Mutual Insurance Company, 20 Vermont, 222; Wilson v. Ætna Insurance Company, 27 Id. 99; N. W. Insurance Company v. Phœnix Oil Co., 81

them, except in the Supreme Court of Indiana,* which followed an adverse decision of Mr. Justice McLean in the Circuit Court for the district of that State.† Its validity has also been sustained by Mr. Justice Nelson in the Circuit Court for the District of Connecticut.‡

We have no doubt of its validity. The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period.

JUDGMENT AFFIRMED.

RAILROAD COMPANY v. HOWARD.

1. Under the laws of Iowa, a railroad company, having power to issue its own bonds in order to make its road, may guaranty the bonds of cities and counties which have been lawfully issued, and are used as the means of accomplishing the same end.
2. A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the *stockholders*, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 80 per cent.), and the stockholders of the company the residue of the proceeds —a fraction (16 per cent.) of the par of their stock—held fraudulent as against general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on a sale in open market did not bring near enough to pay even the mortgage debts; so

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Pennsylvania State, 449; Brown and Wife v. Savannah Insurance Company, 24 Georgia, 101; Portage Insurance Company v. West, 6 Ohio State, 602; Amesbury v. Bowditch Insurance Company, 6 Gray, 603; Fullam v. New York Insurance Company, 7 Gray, 61; Carter v. Humboldt, 12 Iowa, 287; Stout v. City Insurance Company, Id. 371; Ripley v. Ætna Insurance Company, 29 Barbour, 552; Gooden v. Amoskeag Company, 20 New Hampshire, 73; Brown v. Roger Williams Company, 5 Rhode Island, 394; Brown v. Roger Williams Company, 7 Id. 301; Ames v. New York Insurance Company, 4 Kernan, 253.

* The Eagle Insurance Company v. Lafayette Insurance Company, 9 Indiana, 443.

† French v. Lafayette Insurance Company, 5 McLean, 461.

‡ Cray v. Hartford Insurance Company, 1 Blatchford, 280.

that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees.

3. A sale by a railroad corporation not authorized in its corporate capacity to make it, may be yet validly carried into effect by the consent of all parties interested in the subject-matter of it.
4. Stockholders in a corporation need not be individually made parties in a creditor's suit where their interest is fully represented both by the railroad company and by a committee chosen and appointed by them.
5. Contracts are not necessarily negotiable because by their terms they enure to the benefit of the bearer. Hence a receipt by which a person acknowledges that he has received from another named so many shares of stock in a specified corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free, in the hands of a transferee, from equities which would have affected it in the hands of the original recipient.
6. The fact that a creditor has a remedy at law against a principal debtor, does not prevent him, after the issue in vain of execution against such principal, from proceeding in equity against a guarantor.

APPEAL from the Circuit Court for Iowa. The case was thus:

The Mississippi and Missouri Railroad Company—a company in Iowa, and by the laws of that State, having power to issue its bonds to carry into effect the purposes for which it was created—was incumbered by five several mortgages, given to secure bonds which it had executed, amounting, with arrears of interest, to $7,000,000; a sum greatly beyond what the road was worth. The interest was largely in arrears, and the company was insolvent. The Chicago and Rock Island Railroad Company—another company—made overtures for the purchase of the former road, offering to give for it $5,500,000, a sum more than it was worth, though, as just said, much less than what it owed. But the offer was contingent upon getting a title at once. The directors of the insolvent road had power, under its charter, to sell it on payment of its debts, and with the assent of two-thirds of its stockholders; but the only mode to make a satisfactory title which now seemed possible, was by a foreclosure under one of the mortgages; a matter which it was supposed, apparently, that it might be in the power of the stock-

holders, by the interposition of difficulties, to delay. Under these circumstances, a meeting of the *holders of the stock* and of the various classes of mortgage bonds of the company was called, to determine what should be done with the road. And it was resolved, at this meeting, to sell the road for the $5,500,000 offered; *provided*, that the purchase-money be distributed among the bondholders and *stockholders* of the company, according to a plan or "scale" specified, by which the different classes of bondholders were to be paid certain specified amounts, varying from 100 to 30 per cent. of the amount of their bonds, and the *stockholders were to receive* 16 *per cent. of the par value of their stock*, amounting to $552.400. A committee was appointed to arrange the details of the sale, and the mode of payment with the purchasing company; and the committee was instructed "to make an arrangement with some trust company to receive the bonds and stock of the parties assenting and issue certificates therefor, *setting forth what the holder thereof is entitled to receive.*"

In pursuance of these resolutions, a written contract was made between the Mississippi and Missouri Railroad Company and the purchasing company, which in its caption was stated to be made "in pursuance of resolutions passed by the meeting of the *bondholders* and *stockholders*" of the former company, by which it was agreed,

1. That the Mississippi and Missouri Company "will take the proper steps, with all possible despatch, *to cause the mortgages upon its line of road*," &c., &c., "*to be foreclosed*, and its entire property, real and personal, *sold*, so that the purchaser shall be able to transfer a perfect and unincumbered title to such incorporated company as the Chicago and Rock Island Railroad Company may designate to become the purchaser and owner thereof."

2. That the Chicago and Rock Island Company shall cause a company to be incorporated under the general law of Iowa, which shall purchase the said property for $5,500,000; and the Mississippi and Missouri Company agree that the purchaser, at the foreclosure sale, shall sell to such company so to be incorporated, "for the sum and upon the terms herein stated and set forth."

Statement of the case.

The committee appointed at the meeting, to carry into effect the sale of the road, made arrangements as instructed by the resolution appointing them with the Union Trust Company of New York, to act as their agent to receive from the holders of bonds and stock, assenting to the plan agreed on, their bonds and stock certificates, and to give receipts to them therefor. A written agreement was subscribed by the committee, and by each party so depositing bonds or stock, entitled, "Agreement made between A. B., and other subscribing holders of the stock and bonds of the Mississippi and Missouri Railroad Company of the first part, and G. W. S., J. E., &c. (the committee), of the second part." By this instrument (after reciting the action of the meeting, and the agreement of sale between the two railroad companies, "in furtherance of" the resolutions of the meeting; and that the committee to effectuate this clearance and sale were about to foreclose the various mortgages, in order subsequently to convey a clear title to the purchaser or purchasers thereof) the subscribing bond and stock holders ratified and confirmed the authority given to the committee by the meeting, and consented to the foreclosure of mortgages, and sale of the Mississippi and Missouri Road thereunder; and to surrender their bonds and *stock certificates*, on signing the agreement, to the Union Trust Company, as agent of the committee, to be used in carrying out the sale and foreclosure.

The committee agreed to use all diligence in foreclosing; to convey the road, after foreclosure, "as more fully set forth in the agreement between the two companies for $5,500,000; and to distribute the same among the holders of *stock* and bonds, according to the following scale, viz." (specifying the amounts to be paid on the different classes of bonds, and the 16 per cent. to the stockholders, as agreed on at the meeting), the amounts to be paid in the form in which the proceeds of sale were received, and to be either money, or bonds secured as provided in agreement of sale between the railroad companies.

The trust company issued certificates to the depositors of stock, acknowledging the receipt of their old certificates

of stock, and declaring them to be held subject to the agreement made by the depositors and other holders of the stock and bonds of the company, with the committee; and that the receipt now issued entitled "the *bearer*" to so many dollars in the new bonds to be issued, and interest thereon at the rate of 7 per cent. per annum, from December 1st, 1865, less the excess, if any, of the cost of foreclosure, sale, and other expenses of the committee, &c.; over and above $52,164, unappropriated balance of $5,500,000, derived from the sale of said road, and any and all the rights of the said depositor, under and by virtue of the agreement aforesaid.

On the back of the receipt was printed the scheme of distribution, specifying the proportion to be paid on each class of bonds and on the stock.

The holders of the stock and bonds (with unimportant exceptions) became parties to this agreement by depositing their stock and bonds with the trust company, signing the agreement, and taking their receipts as above.

The foreclosure was effected thus: Some holders of bonds, secured by the last mortgage, being dissatisfied with the above plan, caused a suit to foreclose that mortgage to be commenced in the Circuit Court for Iowa, in the name of the trustees of the mortgage, early in 1866. The Chicago and Rock Island Railroad Company subsequently purchased the bonds of these parties, and obtained the control of the suit, which was then turned over to the committee. Under their direction, cross bills to foreclose the other mortgages were filed, and a final decree of foreclosure of all the mortgages and for a sale of the road was had. A sale under this decree took place soon after, and the road was bid off by a new corporation, which had been organized under the Iowa law, for $2,200,000, which sale was afterwards confirmed, and a deed made in pursuance of it. The new company after the sale was consolidated with the Chicago and Rock Island Company, the consolidated company assuming the name of "The Chicago, Rock Island and *Pacific* Railroad Company." The $5,500,000 of bonds, agreed to be given for the property of the Mississippi and Missouri Company, were distributed as

agreed on, except that portion thereof which was to have been divided among the stockholders. In regard to *that*, new claimants now appeared. These were, Howard, Weber, and numerous other persons, who had obtained judgments against the Mississippi and Missouri Railroad Company, on certain bonds of the cities of Davenport, Muscatine, &c., *guarantied* by the railroad company, but making no part of the bonds already mentioned, as executed by the Mississippi and Missouri Company, nor secured in any way by the mortgages foreclosed, nor provided for in the transactions above set forth. These creditors, on whose judgments executions had been issued and returned *nulla bona*, now filed a bill in the court below, to obtain satisfaction of their claims out of the fund of 16 per cent. allotted to the stockholders; making the committee who negotiated matters, all three railroads, and the city of Davenport (against which also they had obtained judgment) defendants. Answers were filed by the members of the committee, and by the Chicago, Rock Island and Pacific Railroad Company. The decree made in the case declared the complainants entitled to the fund, as creditors of the Mississippi and Missouri Railroad Company, directed its payment by the Chicago, Rock Island and Pacific Railroad Company to a receiver, its conversion by him into money, and distribution *pro rata* among the different creditors; providing also for subrogating the defendants to the rights and remedies of the plaintiffs, against the municipalities issuing the bonds, so far as they were paid out of the fund in controversy. From this decree the committee, and the Chicago, Rock Island and Pacific Railroad Company appealed; and this appeal constituted the present case: the principal question being, whether the court below, in allowing the creditors unprotected by mortgage to take away the 16 per cent. which had been allowed to the stockholders, had decreed rightly. The Mississippi and Missouri Railroad Company did not appeal.

Messrs. Emmot, Cook, and Drury, for the appellants:

1. We submit as a preliminary point that the guaranty made by the Mississippi and Missouri Railroad Company,

of the Davenport city bonds, was beyond the power of the corporation, and void. A railroad corporation can no more guaranty the payment of a bond issued by a town or a county, than it can the payment of a similar obligation made by an individual, to enable either to raise money to pay their subscriptions to its stock.*

2. Passing to the main matter. The decree below assumed that the 16 per cent. was a dividend of capital on the dissolution of the railroad company to its stockholders, something saved from the bondholders for the company, *its* property, therefore; and assuming this, it would argue, and argue rightly enough, that the stockholders were entitled to nothing till all creditors were paid. But the assumption made is a false one. This company was hopelessly bankrupt. Its bonded debt was about seven millions, while the proceeds of the sale amounted to but five and a half millions, even this sum being more than it was worth; the real price was, of course, below $2,200,000, that being as much as the road actually brought at a fair public sale. This fact makes it clear that the bond debt of the company completely exhausted its property, and left nothing for general creditors and stockholders. The property of every corporation is a *trust* fund for payment of the debts of the company, but a fund for their payment in the order in which they are due. This fund was held in trust, not for creditors generally, but for the bond creditors primarily. It was theirs; and as the bond debts far exceeded the fund, it was theirs only. The stockholders were entitled to nothing as a matter of right.

How, then, do they get it? The explanation is obvious. From the fund going to the bondholders, they agree to give to the stockholders 16 per cent. Whatever form, show, or courtesy toward the stockholders (whom it was desired to conciliate, and to treat as if they had some rights of value, though they had really none) the thing had, such was the

* Bank of Genesee *v.* Patchin Bank, 3 Kernan, 309–314; Bridgeport City Bank *v.* Empire Stone-dressing Co., 30 Barbour, 421; Morford *v.* Farmers' Bank of Saratoga, 26 Id. 568.

real operation. No other operation which should have the same effect was possible. Now in this view, a true one, what legal claim have these complainants, creditors of one sort though they be, to this fund; a fund which is really but a surrender by the bondholders of *their* property to the stockholders? What have the complainants lost by this arrangement? Nothing. If the 16 per cent. had not been given to the stockholders, it would have been retained by the bondholders, and then, certainly, the complainants could not contend that they would be entitled to it.

The argument will be that this was a *contract* between the bondholders, stockholders, and the railroad company, to divide the proceeds in a certain way, and that the railroad company should sell the road, and should procure a foreclosure of the mortgages.

Any agreement, however, by which the railroad company bound itself to have the mortgages foreclosed and the property sold, so that the purchaser might transfer a perfect title to any company whom the Chicago and Rock Island Road might designate, was, independently of the bond creditors, impossible. How could the railroad company or the stockholders procure a foreclosure of its mortgages? They had no control of them. Suppose that the bondholders had refused to foreclose the mortgages, how could the railroad company or any one else procure the title under the foreclosure so as to transfer a perfect title to any designated person? There would have been no agreement of any value then by the company, even if the *company* agreed at all.

But the meeting where all was done that was done in this matter was a meeting of the bondholders and stockholders only. The railroad company as a corporation had nothing to do with it. The bondholders and stockholders acted, each man for himself. The question was: "We being all interested in an insolvent corporation, what can we best do to promote our common interest?" The bondholders say to the stockholders, "We wish to sell. Confessedly the road will not bring anything like the amount of our mortgages. You have no real interest in the thing under any circumstances.

But do not interpose captious and unjust objections. Let us have the money confessedly due to us, and ours, and we will give you a small part of it." Is there anything unfair in that?

We suppose that no question will be made but that, in the first instance, and aside from any agreement, the bondholders were entitled to every dollar of this money. The road was mortgaged for near three times its value, and the equity of redemption was supremely worthless. If, then, these stockholders have got anything, it must be because the bondholders have *surrendered* a part of *their* fund to them. If the fund belonged to the bondholders, they had a right so to surrender a part or the whole of it. And if the bondholders did so surrender their own property to the stockholders, it became the private property of these last; a gift, or, if you please, a transfer for consideration from the bondholders, whose it had before exclusively been in absolute property. What right have these complainants to *such* property in the hands of the stockholders?

If the road had been worth anything above the mortgage they would have some case. But it is a *datum et concessum* of this controversy that the road was worth very far less than the mortgage debts upon it, and that these were increasing, while the road of necessity was growing less valuable. In one sense the mortgagees held but liens on the road, but in fact they were the owners; and so, in strict view, they were, in form, a mortgage being *a conveyance* in fee subject to defeasance by redemption; a right that here it was absolutely certain neither would or could ever be exercised.

Some additional points apart from the main one deserve to be suggested, as that—

3. The *corporation* could not sell its road, and did not undertake to sell it. It could not, because the directors of the company were authorized to sell only *provided* that, 1. Its debts were first paid. 2. That two-thirds of its stockholders assented to such sale. Now the agreement between the railroad companies was not an agreement for any such sale, and did not satisfy these conditions.

4. There is a defect of parties. Here is a fund amounting to over half a million of dollars, claimed by the stockholders and sought to be recovered by the general creditors of the railroad company, and yet, not a single one of the stockholders is made a party. Their right to this fund is to be determined without allowing them a hearing, or a day in court.

5. The certificates issued by the Union Trust Company were payable to *bearer*, and therefore negotiable. They have doubtless been sold in the market as other certificates of stock, and are now in the hands of persons other than the stockholders not parties to this suit. If payment of the 16 per cent. is arrested and diverted to the payment of the debts of the railroad company, these innocent third parties will be sufferers. This proceeding thus partakes of the character of a garnishment at law. The trustees are called on to pay these bonds to the creditors of the defendant. Their answer is: "Our liability is on negotiable paper, and we can't say that we are indebted to the defendant."

6. The complainants have a remedy at law. Numerous decisions recently made in this court, and especially the late one in *Riggs* v. *Johnson County*,* show that vigorous measures have been taken against these defaulting cities and counties to enforce payment of these judgments. These measures are about to be crowned with success. Writs of mandamus against several cities and counties are now in the hands of the officers of the law. Let them proceed to collect their money. These are the parties who ought to be made to pay, and let the stockholders enjoy the small amount saved by them from a wreck.

Messrs. Grant and Rogers, contra:

1. As to the guaranty and its effect. We doubt not that the road which had, confessedly, power to borrow by executing bonds as a principal, had power to borrow by guaranty as well. But however this may be, as the Mississippi and

* 6 Wallace, 166.

Missouri Railroad Company, the guarantor, though made a party defendant, made no defence in the court below, and does not appeal, the other defendants are thereby concluded from controverting the *status* of the complainants as creditors of the railroad company.*

2. Passing to the principal point. The appellants deny our right to the fund in controversy, on the ground that it belonged absolutely to the mortgage bondholders of the railroad company, who have seen fit, as a matter of favor, to surrender it to the stockholders.

Now, the fund in question is a part of the purchase-money agreed to be paid for the road, and other property of the Mississippi and Missouri Company, on a *voluntary private* contract of sale of it to another company, to which contract the two companies and the bondholders and stockholders of the Mississippi and Missouri Company were all alike parties.

The foreclosure and sale thereunder were simply the form of conveyance, concerted and agreed on by the parties, and effected in pursuance and execution of the contract. They bear the same relation to the real transaction, which the forms of a fine, or common recovery (when those ancient modes of conveyance were in use), bore to the real contract in pursuance of which they were gone through with. Those old proceedings wore, on their face, all the outward insignia of a suit at law. There was a plaintiff and a defendant, formal pleadings, and a judgment entered of record. But the whole thing was a form, intended to carry into effect a previous private agreement, and was for centuries before it went out of use, regarded as a mere mode of conveyance, one of the common assurances of the realm, and so treated by legal writers. We read, in connection with the subject, of previous or concurrently executed deeds, in which the one or the other party covenants to levy a fine or suffer a common recovery of the property to be conveyed, and of deeds

* Holyoke Bank v. Goodman Paper Manufacturing Company, 9 Cushing, 576.

to declare or lead the uses of such fine or recovery, when levied or suffered; in which deeds, of course, the substance of the whole transaction was to be found. These instruments have their counterpart in the case now before the court. The contract between the two railroad companies, by which the Mississippi and Missouri Company agrees to "cause the mortgages on its line of road, &c., to be foreclosed, and its entire property, real and personal, sold, so that the purchaser shall be able to transfer a perfect and unincumbered title," &c., fulfils the same office as the deed covenanting to suffer a recovery and declaring its uses, while the formal foreclosure proceedings answer exactly to the recovery itself.

It is said by appellants' counsel that the contract of sale was void, because the Mississippi and Missouri Railroad Company had no power, under its articles of incorporation, to sell the road without the assent of two-thirds of its stockholders.

But it is in fact unimportant whether the transaction of the sale and agreement to divide the proceeds thereof were the result of regular and formal corporate action on the part of the Mississippi and Missouri Railroad Company, or not. If the officers of a corporation see fit to turn over the control of its affairs and property to an outside caucus of its stockholders, and the agents thereby appointed, and permit such irregular agencies in fact to dispose of its assets, the rights of its creditors are just the same in the proceeds realized as though the sale had been regularly ordered at a corporate meeting and formally entered on the corporate records. No distinction, for the present purpose, can be taken between the stockholders and the corporation. The stockholders *constitute*, collectively, the corporation. They control its action; and whether they do so in a regular way, or undertake and are permitted to do it in an irregular one, can make no difference as to the rights of creditors to compel the appropriation of the corporate property, or its avails, to the payment of the corporate debts.

The fund in question being thus part of the proceeds of a

sale of the railroad, by voluntary contract, assented to by its mortgage bondholders, and its attitude being the same as though the road had been conveyed to the new company, in consideration of the $5,500,000, directly by deed of the railroad corporation, the mortgagees joining therein, and releasing the lien of their mortgages, we may consider the main argument urged by the appellants, viz., that the fund was never, in favor of creditors, part of the assets of the corporation, but was the absolute property of its mortgage bondholders, and has been bestowed by them upon the stockholders.

We deny both branches of this proposition. We maintain (1) that this fund was never the property of the bondholders; and (2) that their agreement to relinquish their *lien* upon it, or rather upon the property by the sale of which it was realized, for a less sum than their whole debt, *leaving* this remainder, so far from being a gratuity, was made upon a perfectly adequate consideration.

The error in the argument on the other side is, that it treats the *mortgagees* of the railroad as its absolute owners, with full power to sell and dispose of it at their sole will and pleasure, and to do with the proceeds whatsoever seemed to them good. But they were simply creditors of the railroad company, secured by a pledge of its property; merely lienholders. The ownership, subject to the liens, was in the company. It alone could sell and convey the road, subject to the liens of the mortgagees, if without their concurrence, or free from such liens if such concurrence were obtained.

The rights and powers of the mortgagees, in respect to the property, were simply either to release their mortgages, or to foreclose them by judicial proceedings. It is said that their claims amounted to more than the road was worth, and more than the $5,500,000 realized by the sale. Whether or not they were more than the value of the road (whatever conjectures may be hazarded), no court can now judicially say; for the only test of the question recognized by the law has been rendered impossible by a public judicial sale of the road, under an *actual* foreclosure. But were it as asserted

by the appellants, the fact could not enlarge the rights of the mortgagees to those of proprietors. And as to the $5,500,000 purchase-money, it was obtained by a sale which the mortgagees had neither the right nor the power to make without the co-operation of the railroad company; which co-operation, if given, constituted an ample consideration for any concessions which the mortgagees agreed to make in order to obtain them.

3. What, then, did these two parties, the railroad company and its mortgage bondholders, standing in these relations to each other and to the property, actually do? The bondholders in effect say to the stockholders: "If you, who constitute and control the Mississippi and Missouri Railroad Company, will agree to sell the road to the Chicago and Rock Island Company for the $5,500,000, which they offer to give for it, and will procure the company's co-operation in the necessary steps to consummate the sale and transfer the title, with all possible despatch, we will agree, in consideration of such consent and co-operation, to receive, in full satisfaction of our bonds, so much of the purchase-money as will leave a balance of it sufficient to pay you sixteen per cent. on your stock; and will release all claim upon such balance, and let you divide it, if you choose, among yourselves." This offer was accepted (as well it might be) by the stockholders, and the scheme was carried into effect in the manner already detailed.

In short, the company effected a *compromise* of its obligations to its mortgage-bondholders, and thereby saved a remnant of its property from their grasp. And this compromise was effected with the intent that the remnant thus saved, and which when *released* by the mortgagees became in law assets of the Mississippi and Missouri Company, should go to the stockholders. That is, the parties intended to commit a fraud upon the complainants and all other general creditors of the company.

The idea is implied in the argument on the other side, that the mortgage-bondholders have some interest in having this money go to the stockholders, and that some wrong will

be done to *them* by giving it to the complainants. But such is not the case. The bondholders have no interest in the matter. They have received all they bargained for, viz., the proportion stipulated to be paid them on their bonds; and it is obviously wholly indifferent to them what becomes of the residue. That residue, as already shown, *they* agreed, on sufficient consideration, to *relinquish*. Their bonds were in no case to be *returned* to them. They were *cancelled and satisfied* by the completion of such sale and the payment to the receipt-holders of the agreed share of the purchase-money, as specified in their respective receipts.

We pass to the minor points.

4. If the stockholders were necessary parties, it amounts to a denial of justice; for it was impossible to make them parties. Their number was very great; their names were unknown to the complainants; and many, without doubt, resided beyond the reach of the process of the court. But on no principle were they necessary parties. Their rights and interests are doubly represented by parties brought before the court, viz., 1st, by the corporation itself, the Mississippi and Missouri Company, of which they were members; 2d, by their own committee, chosen and appointed by themselves.

5. The proposition that the receipts issued by the trust company were payable to bearer, and therefore negotiable, hardly requires refutation. A written contract is not negotiable, simply because by its terms it is to enure to the benefit of the bearer. These receipts were not negotiable. They were assignable, no doubt, and would have been so had the word "bearer" been omitted. But assignees take them subject to every equity affecting them in the hands of the original holder.

6. The remedies at law against defaulting cities have, as is commonly known, thus far practically proved of no value in Iowa; and whether they "are about to be crowned with success," remains to be seen. They are, therefore, not an "adequate remedy." The complainants will, at all events, if the relief prayed for is granted, enjoy them by subrogation.

Mr. Justice CLIFFORD delivered the opinion of the court.

Subscriptions were made to the Mississippi and Missouri Railroad Company by certain municipal corporations through which the railroad was located, and the proper authorities of those municipalities issued their bonds in payment of such subscriptions to the stock of the railroad company.

Coupons were attached to the bonds providing for the payment of interest semi-annually, and the railroad company, as the immediate transferees of the bonds, guaranteed that the principal and interest of the bonds should be paid as stipulated by an instrument in writing on the back of each bond, duly executed by the proper officers of the railroad company.

Obvious purpose of that guaranty was to augment the credit of the bonds in the market, and to facilitate their sale to capitalists to raise money to construct their railroad and put it in operation. Complainants became the lawful holders for value of a large number of these bonds, and the guarantors as well as the obligors neglecting and refusing to pay the coupons as the same fell due, they brought separate suits against those parties, and recovered judgments against them respectively, as alleged in the bill of complaint.

Executions were issued as well on the judgment against the obligors of the bonds, as on the judgment against the guarantors of the same, and the return of the officer in each case was that he found no property. Prior to the date of those judgments, the railroad company had executed several mortgages of their railroad to secure the payment of their bonds, issued at different times, to the amount of seven millions of dollars, and the company had become insolvent. They had also become liable as guarantors of the municipal bonds already described, and others of like kind received and used for the same purpose, to the amount of three hundred thousand dollars, the payment of which was repudiated by the respective municipal corporations, by whose officers the bonds were issued.

Unable to pay the debts of the company, the stockholders

of the same determined to sell their railroad. Arrangements were accordingly made between the stockholders and the holders of the mortgage bonds to get up the stock of the company through certain agents or trustees, and to execute and deliver to the several holders of those bonds and to the owners of the stock of the company, certificates of the amounts that they respectively would be entitled to receive under a distribution of the consideration of the proposed sale. Amount of the consideration, as assumed in the arrangement, was five millions five hundred thousand dollars, and the terms of the arrangement were that the consideration should be distributed among the parties interested therein, according to a prescribed scale as set forth in the bill of complaint.

By that scale of distribution sixteen per cent. of the amount, to wit, five hundred and fifty-two thousand four hundred dollars were to be paid to the owners of the capital stock, but none of the stipulations in the arrangement made any provision for the payment of the bonds or coupons belonging to the complainants. Authorized to carry the arrangement into effect, the proper agents of the company offered to sell the entire property of the railroad to the Chicago and Rock Island Railroad, and the latter company, on the first day of November, 1865, accepted the proposition, and the parties entered into written stipulations upon the subject.

Those proposing to sell agreed that they would, with all possible despatch, cause the mortgages on the railroad to be foreclosed, and that the entire property of the company, real and personal, should be sold and conveyed to trustees, and that the same should be transferred to such incorporated company in that State as the other contracting party should designate as the purchaser of the property, if such designation was made within the time therein prescribed.

By the terms of the agreement the Chicago and Rock Island Railroad Company agreed to cause to be incorporated in that State a company which should make the purchase, as proposed, for the sum of five million five hundred thousand dollars, and complete the railroad to the place therein men-

tioned, and the other party stipulated that the purchaser at the foreclosure sale should convey the railroad to the new company for that consideration. Pursuant to that agreement the mortgages were foreclosed, and the new company, to wit, the Chicago, Rock Island, and Pacific Railroad Company, was created under the general laws of the State, and the entire property of the railroad was sold at the foreclosure sale, and the purchasers conveyed the same to the new company as stipulated in the agreement. All the stockholders in the old company became thereby entitled, as against all those who joined with them in negotiating the sale, to a *pro rata* share in the sixteen per cent. of the consideration reserved to their use under the scale of distribution prescribed in that arrangement.

Statement of the bill of complaint is, that the new company is ready to pay that amount to the stockholders of the old company, and the complainants contend that the facts herein recited show that they are entitled to have their whole debt paid before any portion of the fund derived from that sale shall go to the stockholders of the old company, which is insolvent, and will become extinct when that arrangement is fully carried into effect.

Views of the complainants were sustained in the court below, where it was ordered, adjudged, and decreed, that the complainants and the other parties who were duly admitted as such, and joined in the prosecution of the suit, were entitled, as creditors of the railroad company, to so much of the purchase-money as was agreed between the parties, and intended to be reserved and distributed among the stockholders of the company, and from that decree, as more fully set forth in the record, the respondents appealed.

I. Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a *bonâ fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the

capital stock nor to any dividend of the profits until all the debts of the corporation are paid.

Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the moneys so received and in their hands.

Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than *bonâ fide* creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts.*

* Story's Equity Jurisprudence (9th ed.), § 1252; Mumma *v.* Potomac Company, 8 Peters, 286; Wood *v.* Dummer, 3 Mason, 308; Vose *v.* Grant, 15 Massachusetts, 522; Spear *v.* Grant, 16 Massachusetts, 14; Curran *v.* Arkansas, 15 Howard, 307.

Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders, and all others interested in its pecuniary affairs, and any one receiving any portion of the fund by voluntary transfer, or without consideration, may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation.

None of these principles are directly controverted by the appellants; but they deny that the sixteen per cent. agreed to be paid to the stockholders belonged to the corporation.

Claim of the complainants to the fund in controversy rests mainly upon two propositions, which present mixed questions of law and fact:

1. That they are creditors of the railroad company, as evidenced by the judgments set forth in the record.

2. That the fund in question was assets of the railroad company.

Authority of the municipal corporations to issue the bonds purchased by the complainants is not denied; but the appellants contend that the railroad company had no power to guarantee their payment, and they also deny that the railroad company had any title or interest in the fund in controversy. On the contrary, they insist that it was a concession made by the holders of the mortgage bonds to the stockholders as a "gratuitous favor" to save them from a total loss, and to induce them not to interpose any obstacles in the way of a speedy foreclosure of the several mortgages.

Express allegation of the bill of complaint is, that the bonds issued by the municipal corporations were received by the railroad company in payment for subscriptions to the stock of the company, and that the corporation, as the holders of the same, guaranteed their payment and sold

them in the market, and the stipulation of the parties is, that all the allegations of the bill of complaint not denied in the answer are to be considered as admitted. Apart, therefore, from the effect of the judgments, those allegations must be taken to be true, as they were not denied in the answer.

Power to make contracts, and acquire and transfer property, is conferred upon such corporations, by the laws of the State, to the same extent as that enjoyed by individuals; and the record shows, to the entire satisfaction of the court, that the instrument of guaranty was executed and the bonds sold in the market as the means of raising money to construct the railroad and put it in operation.

Counties and cities may issue bonds under the laws of that State in aid of such improvements; and railway companies are expressly authorized to receive such securities in payment of subscriptions to their capital stock, and to sell the bonds in the market for such discount as they think proper.

Abundant proof exists in this record, that railway companies may issue their own bonds to raise money to carry into effect the purposes for which they were created; and it is difficult to see why they may not guarantee the payment of such bonds as they have lawfully received from cities and counties, and put them upon the market instead of their own, as the means of accomplishing the same end. Undoubtedly they may receive such bonds under the laws of the State, and if they may receive them, they may transfer them to others; and if they may transfer them to purchasers, they may, if they deem it expedient, guarantee their payment as the means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose.

Considered, therefore, as an open question, the court is of the opinion that the objection is without merit. Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown,

the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.*

Railroad companies are responsible in their corporate capacity for acts done by their agents, either *ex contractu* or *ex delicto*, in the course of their business and within the scope of the agent's authority.†

Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just expectations which their own conduct has superinduced.‡

Tested by any view of the evidence, it is quite clear that the corporation possessed the power to execute the instruments of guaranty appearing on the back of the bonds, and the necessary consequence of that conclusion is that on the default of payment they became liable to the holders of the same to the same extent as the obligors.

Present suit is not one against stockholders to compel them to pay a corporate debt out of their own estate, but it is a suit against the corporation and certain other parties holding or claiming assets which belong to the principal respondent, to prevent that fund from being distributed among the stockholders of the corporation before the debts due to the complainants are paid. Viewed in that light, it is obvious that the stockholders are precluded by the judgment from denying the validity of the instruments of guaranty, and that the judgments are conclusive as to the indebtedness of the corporation.

II. Second defence is that the fund in question did not belong to the corporation, as contended by the appellees.

* Canal Company v. Vallette, 21 Howard, 424; Partridge v. Badger, 25 Barbour, 146; Barry v. Mer. Ex. Co., 1 Sandford's Ch. 280; Angell and Ames on Corporations, § 257; Story on Bills, § 79; Farnum v. Blackstone Canal, 1 Sumner, 46.

† Railroad Co. v. Quigley, 21 Howard, 202.

‡ Bargate v. Shortridge, 5 House of Lords' Cases, 297; Zabriskie v. Railroad, 23 Howard, 397; Bissell v. Jeffersonville, 24 Id. 300.

Extended discussion of that proposition is not necessary, as the evidence in the record affords the means of demonstration that it is not correct. Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected and refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation, and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage as in this case, may exact the whole amount of the bonds, principal and interest, or they may, if they see fit, accept a percentage as a compromise in full discharge of their respective claims, but whenever their lien is legally discharged, the property embraced in the mortgage, or whatever remains of it, belongs to the corporation.

Conceded fact is that the property and franchises of the railroad were sold for the consideration specified in the record, and that the mortgage bondholders discharged their lien for eighty-four per cent. of that amount, and that the residue of the purchase-money remained in the hands of the purchaser discharged of the lien created by the mortgages, and the complainants contend that it was clear of all liens, except that of the creditors. Such a corporation cannot be said to own anything separate from the stockholders, unless it be the tangible property of the company and the franchises conferred by the charter, and it is conceded by both parties that the fund in question was derived from a voluntary sale and transfer of those identical interests. They were heavily incumbered by mortgages, and our attention is called to the fact that the provisional arrangement was negotiated by the stockholders and bondholders; but the decisive answer to that suggestion is, that the two railroad companies were parties to the subsequent contract of sale, and that they both agreed to all the terms of sale and purchase, and to the mode

of transferring and of perfecting the title. Prompt payment was secured by the bondholders, and it is highly probable that they received under that arrangement a larger portion of their claims than they could have obtained in any other way.

Another suggestion of the appellants is that the contract of sale was unauthorized, but the suggestion is entitled to no weight, as the contract was ultimately carried into effect by the consent or subsequent ratification of all parties interested in the subject-matter of the sale.

Next objection is that there is such a want of parties that a court of equity cannot grant the relief as prayed. Principal suggestion in support of this proposition is that the stockholders should have been made parties, but the court is of a different opinion, because their interest is fully represented by the parties before the court. Respondents in the suit are the two railroad companies and the committee or trustees chosen and appointed by the stockholders and bondholders through whom the provisional arrangement was perfected and the contract of sale was carried into effect. Neither the stockholders nor bondholders were necessary parties under the circumstances of this case.*

Remaining objection is, that the certificates issued to the stockholders in lieu of their stock, were negotiable, and that they may be in the hands of innocent holders; but the objection is entitled to no weight, because it is based upon an erroneous theory.

Written contracts are not necessarily negotiable simply because by their terms they enure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the as-

* Bagshaw v. Railway Co., 7 Hare, 131; Holyoke Bank v. Manufacturing Co., 9 Cushing, 576; Hall v. Railroad, 21 Law Reporter, 188; 1 Redfield on Railways, 578; Boon v. Chiles, 8 Peters, 532; Story v. Livingston, 13 Id. 359.

signees took them subject to every equity in the hands of the original owner. *

Particular mention is not made of the defence that the complainants have an adequate remedy at law, as it is utterly destitute of merit.

DECREE AFFIRMED.

SHEETS v. SELDEN.

1. The action of an inferior court as to the terms on which it will allow a complainant to amend a bill in equity to which it has sustained a demurrer, is a matter within the discretion of such court, and not open to examination here on appeal.
2. Where, under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in Indiana (in which State a judgment in ejectment has the same conclusiveness as common law judgments in other cases), for recovery of his estate, as forfeited, and a verdict is found for him, and judgment given accordingly, the tenant cannot, in another proceeding, deny the validity of the lease, nor his possession, nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid.
3. Where, in a lease of a water-power, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of water, the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for non-payment of rent reserved, set up a counter claim for repairs to the water-channel made necessary by the landlord's gross negligence. He is confined to the remedy specified in the lease; a covenant that a lessor will make repairs not being to be implied.
4. In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rents due, and the amount which he could rightly claim by way of reduction for failure of water.

ERROR to the Circuit Court for Indiana.

The State of Indiana, owning a certain canal and its adjacent lands, made *two* leases of its surplus water; the first being made, February, 1839, to one *Yandes* and a certain Sheets (this Sheets being the appellant in this case), and the other made January, 1840, to Sheets alone. Each lease was for the term of thirty years. Certain rents, payable semi-annually, on the first of May and November, were

* Mechanics' Bank v. Railroad Co., 13 New York, 599.

Statement of the case.

reserved; it being provided, that if any rent "should remain unpaid for one month from the time it shall become due," "all the rights and privileges" of the lessees "shall cease and determine, and any authorized agent of the State, or lessee under the State, shall have power to enter upon and take possession of the premises," &c. The leases contained a further provision, that the lessees should not be deprived of the use of the water by any act of the State, or its agents, or by the inadequacy of the supply of water, for more than one month in the aggregate in one year; and that if, for the purposes of repairing the canal, preventing breaches, or making improvements to the canal, or the works connected with it, or the inadequacy of the supply of water, the lessees should be deprived of the use of any portion of the water-power leased, such *deduction* should be made from the rent accruing on such portions of the power as the lessees should be prevented from using, as would bear the same proportion to the yearly rent thereof as the time during which the lessees might have been deprived of its use bears to eleven months. In October, 1840, Sheets became owner of Yandes's interest in the lease of 1839.

The State subsequently sold so much of the canal, land, and water-power as was embraced by the two leases; and one Selden and others, on the 2d of October, 1857, became owners under this sale.

Afterwards (Sheets being in possession, under the leases, and having refused for several years to pay rent), the purchasers formally demanded, on the premises, rents falling due on the first day of May, 1860. The lessee failing to pay them, the purchasers brought, in June, 1860, an ejectment in the Circuit Court for Indiana (in which State the action of ejectment is regulated by statute, and has the same conclusiveness as common law judgments in other cases), to recover the possession of the property, as for forfeiture from non-payment of the rents reserved in the two leases. Verdict and judgment were given in their favor.*

* See 2 Wallace, 177.

Statement of the case.

After five years had elapsed since the commencement of the ejectment, the lessee now filed a bill in equity (the suit below) to enjoin the issuing of a *habere facias* on the judgment in ejectment, and for a redemption of the lands from the forfeiture incurred for non-payment of rent.

The bill alleged that while the ejectment was pending, the lessees tendered to the purchasers $400, as in full for the particular rents, for the non-payment of which the forfeitures were declared, and as in full for interest thereon, and the costs of suit up to that time, and that the same was now brought into court for the purchasers if they would accept it and waive the forfeiture; but it tendered nothing for rents *subsequently* or previously accrued. It sought to avoid such a tender by asserting an equity to set off against all rents a demand for damages on account of alleged breaches of covenants, contained in the leases. As for—

1. Inadequacy in the supply of water, when by the use of proper efforts, an adequate supply might have been furnished.

1. Inadequacy of supply, owing to the culpable negligence and gross carelessness of the purchasers in failing to repair breaches in the canal banks, and to remove obstructions created by the growth of grass in the bottom and sides of the canal, &c., setting up the expense of repairs alleged to have been made by the lessee to render the supply adequate.

3. Not prohibiting lessees under subsequent leases from drawing off needed water from the mill of the original lessee to supply their own.

The claim of reductions of the rents owing to failure of water were from the 2d October, 1852, when the title of the purchasers accrued, to the 1st May, 1865, when the last instalment of rents before the filing of the bill came due, and amounted to $2649. The rents during the same term amounted to $4500.

The lessee alleged as an excuse for not paying the rents on one of the leases, that he had abandoned that lease, and that the purchaser under the State acquiesced, and that the title so became vested in them by reverter, and declined to

redeem that lease from forfeiture. While thus declining to redeem that lease, his bill sought to enjoin the *whole judgment.*

The defendants demurred; and the court sustained the demurrer; giving leave to the complainant to amend his bill on tender of all the rent, with interest on it that had accrued on *both* leases since the bringing of the ejectment, which sums the court found to be, on one lease $4494.50, and on the other $2247.25. The complainant refusing to amend on such terms, judgment was given on the demurrer against him, and he brought the case here.

Mr. Barbour (*a brief of Mr. Morrison being filed*), *for the appellant:*

1. Assuming, as we have the right to assume (the case being on a demurrer), that the facts alleged in the bill of complaint are true, the permission to amend was clogged by an onerous and inequitable condition. The suit in ejectment embraced premises covered by two several and independent leases, executed on different days, and to different parties, one of them to Yandes and the appellant, the other to the appellant alone; and yet the court ruled, that the two, for all the purposes of this suit, were one and indivisible, and that therefore, an ample tender, for the purpose of redeeming either one of them, would be of no avail, unless it should be sufficient to cover the other one also. In this there was error. The appellant had the right to pay the sum demanded for the quarter's rent of the premises held under the first lease, had he elected to do so. And if he had done this, the appellees could have declared no forfeiture as to *that* lease. The demands were separate and distinct acts, for distinct sums. The appellant had the right to save *either* premises, and let the other go, if it pleased him.

Even if the bill of complaint did not show a case that should entirely and fully absolve Sheets from all his obligations under the lease to himself, still its defects, in that regard, cannot affect so fatally the other lease.

2. The bill, as to the lease not surrendered, contains suffi-

cient equity to entitle the appellant to be relieved as to *it*. The court below assumed that the lessees could claim nothing by way of set-off, or recoupment, for any damages or injury sustained by them, consequent upon the failure to supply water, except an *abatement of rents* for such time as they might have been deprived of the specified supply, beyond one month in each year.

The assumption is unwarranted, unless it is shown that the appellee had used some diligence to furnish the requisite supply. But the bill avers and the demurrer admits that the appellant was deprived of the water-power *by the culpable carelessness and gross negligence* of the appellee.

If these averments would not entitle the appellant to damages against the appellee, as well as to an abatement of rents, then the latter would not be liable, had he cut the canal banks, and thereby deprived the appellant eleven months in the year.

The demise of the water-power and the land is equivalent to a covenant that the water *shall be supplied*. No particular words are necessary to constitute a covenant in a lease. It is sufficient if it be such as to show the intention of the party to bind himself to the performance of the matter stipulated for; and when covenants exist they are to be construed according to the apparent intention of the parties, looking to the whole instrument, and to the context, and the reasonable sense and construction of the words; so that a covenant is broken if the intention is not carried out.*

The general rule, that unliquidated damages cannot be set off or recouped in an action at law, is admitted; but the rule does not hold in equity, which is independent of statutes of set-off; and, besides, this being a suit in equity, the court will see to it, that the decision shall settle the mutual rights of the parties, fully and completely.

Mr. T. A. Hendricks, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a case in equity. The appellant filed his bill to

* Comyns' Digest, title "Covenant," E.

enjoin the execution of a judgment in ejectment. The defendants demurred, and the demurrer was sustained.

The court gave leave to amend upon terms which the appellant declined to accept. A decree was thereupon entered that the bill should be dismissed, and for costs. This appeal brings the case here for review.

With the leave to amend we have nothing to do. The terms imposed were within the discretion of the court, and are not open to examination in this proceeding.

The only question before us is, whether the Circuit Court erred in sustaining the demurrer and dismissing the case. The bill is very voluminous. We will consider the points to which our attention has been called, so far as is necessary to the proper determination of the rights of the parties.

The recovery was had in the action of ejectment, upon the ground of forfeiture for the non-payment of the rents reserved in two leases.

Both courts of law and of equity have power to give relief in cases of this kind. Courts of law give it upon motion, which may be made before or after judgment. If after judgment, it must be made before the execution is executed. The rent due, with interest and costs, must be paid. Upon this being done, a final stay of proceedings is ordered.*

The first British statute upon the subject was the 4th George II, ch. 28. The practice is now regulated by the 15 and 16 Victoria, ch. 76.

Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest, and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that

* Tidd's Prac., 8 Amer. Ed. 1234; Phillips v. Doelittle, 8 Modern, 345; Smith v. Parks, 10 Id. 383; Atkins v. Chilson, 11 Metcalf, 115.

the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign. Lord Eldon limited the relief to cases where the lease required the payment of a specific sum of money. The authorities going beyond this he held to be unsound, and declined to follow them. Speaking of *Wadman* v. *Calcraft*,* he said the Master of the Rolls in that case held, "that, though against ejectment for non-payment of rent the court would relieve upon a principle long acknowledged in this court, but utterly without foundation, it would not relieve where the right of the landlord accrued, not by non-payment of rent, but by the non-performance of covenants which might be compensated in damages."† Such is now the settled English rule upon the subject.‡ In *Bracebridge* v. *Buckley*,§ Baron Wood, in a dissenting opinion, made an earnest and able assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country.‖

Lord Redesdale held that where there were unsettled accounts between the landlord and tenant, which could not be properly taken at law, the payment or tender of money on account of the rent might be deferred until the rights of the parties were settled by the decree of the court, but that where the accounts were not of this character, equity would not intervene.¶

* 10 Vesey, 68. † Hill v. Barclay, 18 Vesey, 63.

‡ 2 Story's Eq., §§ 1315, 1316; Davis v. West, 12 Vesey, 475; Reynolds v. Pitt, 19 Vesey, 134; Gregory v. Wilson, 10 English Law and Equity, 138; Eaton v. Lyon, 3 Vesey, 690; Hill v. Barclay, 16 Id. 402.

§ 2 Price, 200. ‖ 2 Story's Eq., §§ 1315, 1316, and notes.

¶ O'Mahony v. Dickson, 2 Schoales & Lefroy, 400; O'Connor v. Spaight, 1 Id. 305.

The recovery in ejectment is an important feature in the case before us. In Indiana the action is regulated by statute, and the judgment has the same conclusiveness and effect as common law judgments in other cases. The judgment against the appellant established the validity of the leases, that he was in possession, his obligation to pay the rents reserved, and that the instalments demanded were due and unsatisfied. He is estopped from denying these facts, and from setting up anything in this case to the contrary.

In the case of the *Trustees of the Wabash and Erie Canal* v. *Brett*,* the trustees had leased so much of the surplus water of the canal as might be necessary for the purposes specified. The right was reserved, upon paying for the mill to be built by the lessee, to resume the use of the water leased whenever it might be necessary for navigation, or whenever its use for hydraulic purposes should be found to interfere with the navigation of the canal. It was averred that the trustees had abandoned that part of the canal, and suffered it to go to decay, so that the water-power was destroyed, and the plaintiff's mill rendered valueless. The court held that there was no implied covenant to keep the canal in repair, that the express provision for compensation in one case excluded the implication of such right in all others, and that the plaintiff was without remedy. This case, like the one under consideration, was decided upon a demurrer by the defendants.

The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended.† A covenant is never implied that the lessor will make any repairs.‡ The tenant cannot make repairs at the expense of the landlord, unless by special agreement.§ If a demised house be burned down by accident, the rent does

* 25 Indiana, 410.

† Aspdin v. Austin, 5 Q. B. 671; Pilkington v. Scott, 15 Meeson & Welsby, 657.

‡ Pomfret v. Ricroft, 1 Williams Saunders, 321, 322, note 1; Kellenberger v. Foresman, 18 Indiana, 475.

§ Mumford v. Brown, 6 Cowen, 475.

not cease. The lessee continues liable as if the accident had not occurred.* If in such a case the landlord receives insurance-money, the tenant has no equity to have it applied to rebuilding, or to restrain the landlord from suing for the rent until the structure is restored.†

The *Trustees of the Wabash and Erie Canal* v. *Brett* is an authority strikingly apposite in this case. In the leases set out in the bill, as in the lease in that case, the parties provided but one remedy for a failure of water. That is, an abatement of the rent in proportion to the extent and time of the deficiency. The contract gives none other. Beyond this it is silent upon the subject. This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them. The appellant is entitled to the remedy specified. *Expressum facit cessare tacitum.* Neither a court of equity nor a court of law can aid him to any greater extent.

This sweeps from the case the claims set up in the bill by the appellant for offset, repairs, recoupment, and damages, leaving to be considered only the claim for a reduction of the rents in the manner stipulated by the parties.

The appellant avers that he abandoned the premises covered by the second lease, that the appellees acquiesced, and that his title thus became vested in them by reverter. This is repelled by the verdict and judgment in the action of ejectment.

He insists that, according to the provision referred to in the leases, he is entitled to a reduction of the rents specifically demanded before the commencement of the action of ejectment. The plaintiffs could not have recovered without proving to the satisfaction of the jury that the exact amount demanded was due. Any failure in this respect would have been fatal to the action. Then was the time for the appellant to assert and prove this claim. He cannot do it now. The judgment is conclusive.

* Moffat v. Smith, 4 New York, 126.

† Leeds v. Cheetham, 1 Simons, 146; Loft v. Dennis, 1 Ellis & Ellis, 474.

Syllabus.

The bill claims reductions of the rents for failure of water from the second of October, 1857, when the title of the defendants accrued, down to the first of May, 1865, when the last instalments, before the filing of the bill, became due, amounting in the aggregate to $2649. The rents, during the same period, amounted to a much larger sum. Conceding the appellant's demand to be correct, he should at least have tendered payment of the difference between these two amounts, and interest, before bringing his bill. In not alleging that he had done so the bill is fatally defective.

A case is not presented upon which a court of equity, according to the settled principles of its jurisprudence, is authorized to interpose. The spirit manifested by the appellant throughout the litigation between the parties, as disclosed by the bill, is not persuasive to such a tribunal to lend him its aid. We think the demurrer was well taken. The decree of the Circuit Court is

AFFIRMED.

PAYNE v. HOOK.

1. The equity jurisdiction and remedies conferred by the Constitution and statutes of the United States cannot be limited or restrained by State legislation, and are uniform throughout the different States of the Union. Hence the Circuit Court for any district embracing a particular State, will have jurisdiction of an equity proceeding against an administrator (if according to the received principles of equity a case for equitable relief is stated), notwithstanding that by a peculiar structure of the State probate system such a proceeding could not be maintained in any court of the State.
2. In a bill in equity in the Circuit Court, by one distributee of an intestate's estate against an administrator, it is not indispensable that such distributee make the other distributees parties, if the court is able to proceed to a decree, either through a reference to a master or some other proper way, to do justice to the parties before it without injury to absent parties equally interested.
3. The sureties of an administrator on his official bond may properly be joined with him in an equity proceeding for an erroneous and fraudulent administration of the estate by him, and where, if a balance should be found against the administrator, those sureties would be liable.

Statement of the case.

4. A bill involving but a single matter and affecting all defendants alike is not multifarious, although it may seek both to open settlements and to cancel receipts as fraudulent

ANN PAYNE, a citizen of Virginia, exhibited her bill in the Circuit Court of the United States for Missouri, against Zadoc Hook, public administrator of Calloway County, in that State, *and his sureties on his official bond*, all citizens of Missouri, to obtain her distributive share in the estate of her brother, Fielding Curtis, who died intestate, in 1861, and whose estate was committed to the charge of the public administrator, by order of the County Court of Calloway County. It appeared that Curtis never married, and that his nearest of kin were entitled to distribution of his estate. The bill, without mentioning of what State they were citizens, and without making them complainants, set forth the names of the distributees, brothers or sisters, like the complainant, of the intestate, or their children. The bill charged gross misconduct on the part of the administrator; that he had made false settlements with the Court of Probate; withheld a true inventory of the property in his hands; used the money of the estate for his private gain; and obtained from the claimant, by fraudulent representations, a receipt in full for her share of the estate, on the payment of a less sum than she was entitled to receive. The object of the bill was to obtain relief against these fraudulent proceedings, and to compel a true account of administration, in order that the real condition of the estate can be ascertained, and the complainant paid what justly belongs to her. It appeared from the bill that Hook had not yet made his final settlement.

The defendant demurred generally, and without assiguing any specific grounds for the demurrer. On the argument of the demurrer below, the demurrer was endeavored to be supported,

1. Because, in Missouri, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators, until final settlement, is given to the local county court, which is the Court of Probate; and because, as the administration complained of was still in progress in the County

Court of Calloway County, resort was to be had to that court to correct the accounts of the administrator, if fraudulent or erroneous.

2. Because the other distributees were not made parties; and so that the case was without proper parties.

3. Because the sureties of the administrator were joined in the proceeding.

4. Because the bill was multifarious.

The court below sustained the demurrer, and the complainant electing to abide by her pleading, the bill was dismissed, and the case brought here by appeal.

Mr. Napton, in support of the decree below:

1. It is perfectly settled, in Missouri, that a court of chancery, under its laws, cannot grant the relief asked in this case until the jurisdiction of the Probate Court is exhausted, or the final settlement of accounts made.* No such settlement was here made.

The question then is, will the Federal court, sitting in Missouri, when called upon to interpret State laws in a case where the jurisdiction is given solely because of the non-citizenship of one of the parties, give a relief which the State courts could not?

The chancery jurisdiction of the Federal courts is, we concede, the same throughout the Union; and conferred by the Judiciary Act and the Constitution. What is equity and what is law does not either, with these courts, depend on the State laws or codes of practice.

But the point is, that upon the very principles of equity law, borrowed from England and adopted here, this case ceases to be one of equitable cognizance (or legal cognizance either), just as well in the Federal courts as in the State courts, because of the peculiar structure of the probate system in Missouri, and because the State laws creating that system, and the adjudged construction of those laws, will be enforced in this tribunal just as they would be in a State tribunal, and not overturned or disregarded.

* Overton v. McFarland, 15 Missouri, 312; Picot v. Biddle, 35 Ib. 29.

If this is not so, we have the anomaly of citizens not of Missouri, having rights *in Missouri* and *under Missouri laws*, which the citizens of Missouri have not; and we put the former not only on an equality with the latter, but actually on a superiority to them. Such a system would be anything else than harmonious. Moreover, it would overturn the whole system of probate jurisdiction in Missouri, so far as persons outside of that State are concerned; for if the United States courts, when called on to construe the Missouri laws concerning administration, &c., can entertain such a bill as the present, contrary to the received practice in this State, then creditors' bills, legatees' bills, bills for marshalling assets, &c., which are common in other States and in England, although unknown in Missouri, would be equally admissible, and thus our system would be completely overturned.

In *Ewing* v. *City of St. Louis*,* the point seems adjudicated:

"A non-resident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the State courts. If in the latter courts equity would afford no relief, neither will it in the former."

The exclusive jurisdiction of the Probate Court of Missouri until a final settlement, is a matter not affecting the chancery jurisdiction as a mere remedy, but in the nature of a right. It is, in effect, a species of limitation law, and so the State tribunals regard it, for there is nothing in the equity law of Missouri different from the equity law of this court.

The point thus made is the principal ground of the demurrer. But,

2. The other distributees having been as much interested as the complainant, would properly have been parties. As matters now stand, the public administrator is liable to be harassed by as many suits as there are distributees.

* 5 Wallace, 419.

8. The sureties are not liable until their principal fails to pay. There is then a complete and adequate remedy against them at law, and on their bond. There is no reason to make them parties in a proceeding like this, even supposing the claim against the principal well founded,—a matter denied.

4. The bill is multifarious. It seeks a rescission of a contract, the overhauling of inventories, accounts, &c., correcting of settlements, and for general relief.

Mr. Glover, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The jurisdiction of the Circuit Court for Missouri to hear this cause is denied, because, in that State, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators, until final settlement, is given to the local county court, which is the Court of Probate; and as the administration complained of is still in progress in the County Court of Calloway County, resort must be had to that court to correct the errors and frauds in the accounts of the administrator.

The theory of the position is this: that a Federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local Court of Probate, she has no better or different rights, because she happens to be a citizen of Virginia.

If this position could be maintained, an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal, of what value would that right be, if the court in which the suit is instituted

could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled.

We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."* If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.†

The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings.‡

"It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."§

* Hyde v. Stone, 20 Howard, 175; Suydam v. Broadnax, 14 Peters, 67; Union Bank v. Jolly's Administrators, 18 Howard, 503.

† Green's Administratrix v. Creighton, 23 Howard, 90; Robinson v. Campbell, 3 Wheaton, 212; United States v. Howland, 4 Wheaton, 108; Pratt et al. v. Northam et al., 5 Mason, 95.

‡ Watson v. Sutherland, 5 Wallace, 78.

§ Boyce's Executors v. Grundy, 3 Peters, 210.

It is very evident that an action at common law, on the bond of the administrator, would not give to the complainant a practical and efficient remedy for the wrongs which, she says, she has suffered. A proceeding at law is not flexible enough to reach the fraudulent conduct of the administrator, which is the groundwork of this bill, nor to furnish proper relief against it. It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond.

But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit.*

The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever.†

The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin,

* Cooper's Equity Pleading, 35.

† West *v.* Randall, 2 Mason, 181; Story's Equity Pleading, § 89 and *sequentia*.

and names the other distributees, who have the same common interest, without stating of what particular State they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation.*

The next objection which we have to consider is, that the sureties of the administrator are not proper parties to this suit. Their liability on the bond in an action at law is not denied, but it is insisted they cannot be sued in equity. If this doctrine were to prevail, a court of chancery, in the exercise of its power to compel an administrator to account for the property of his intestate, would be unable to do complete justice, for if, on settlement of the accounts, a balance should be found due the estate, the parties in interest, in case the administrator should fail to pay, would be turned over to a court of law, to renew the litigation with his sureties. A court of equity does not act in this way. It disposes of a case so as to end litigation, not to foster it; to diminish suits, not to multiply them. Having power to determine the liability of the administrator for his misconduct, it necessarily has an equal power, in order to meet the possible exigency of the administrator's inability to satisfy the decree, to settle the amount which the sureties on the bond, in that event, would have to pay.

* West v. Randall, *supra*; Wood v. Dummer, 3 Mason, 317; Story's Equity Pleading, *supra*.

Syllabus.

Besides, it is for the interest of the sureties that they should be joined in the suit with their principal, as it enables them to see that the accounts are correctly settled, and the administrator's liability fixed on a proper basis. If they were not made parties, considering the nature and extent of their obligation, they would have just cause of complaint.

It is said the bill is multifarious, but we cannot see any ground for such an objection. A bill cannot be said to be multifarious unless it embraces distinct matters, which do not affect all the defendants alike. This case involves but a single matter, and that is the true condition of the estate of Fielding Curtis, which, when ascertained, will determine the rights of the next of kin. In this investigation all the defendants are jointly interested. It is true the bill seeks to open the settlements with the Probate Court as fraudulent, and to cancel the receipt and transfer from the complainant to the administrator, because obtained by false representations; but the determination of these questions is necessary to arrive at the proper value of the estate, and in their determination the sureties are concerned, for the very object of the bond which they gave was to protect the estate against frauds, which the administrator might commit to its prejudice.

The decree of the Circuit Court for the District of Missouri is REVERSED, and this cause is remanded to that court with instructions to proceed IN CONFORMITY WITH THIS OPINION.

PACIFIC INSURANCE COMPANY v. SOULE.

1. When a person whose income or other moneys subject to tax or duty has been received *in coined money*, makes his return to the assessor, the 9th section of the internal revenue act of July 13, 1866, is to be construed as denying to him the right to return the amount thereof in the currency in which it was actually received, and to pay the tax or duty thereon in *legal tender currency*, and is to be construed to require that the difference between coined money and legal tender currency shall be

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added to his return when made in coined money, and that he shall pay the tax or duty upon the amount thus increased.

2. The income tax or duties laid by §§ 105 and 120 of the act of June 30, 1864, and the amendment thereto of July 13, 1866, upon the amounts insured, renewed, or continued by insurance companies upon the gross amounts of premiums received, and assessments made by them, and also upon dividends, undistributed sums, and income, is not "a direct tax," but a duty on excise.

ON certificate of division from the Circuit Court for California.

The Constitution of the United States* ordains thus:

"Direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers."

With this provision of the Constitution in existence, Congress, by an internal revenue act of June 30, 1864,† amended by act of July 13, 1866, laid a certain tax upon the amounts insured, renewed, or continued by insurance companies; upon the gross amount of premiums received and assessments by them; and a tax also upon dividends, undistributed sums, and income. A portion of the ninth section of the internal revenue act of July 13, 1866,‡ and acts amendatory thereto, provide:

"That it shall be the duty of all persons required to make returns or lists of income, and articles or objects charged with an internal tax, to declare in such returns or lists whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money; and in case of neglect or refusal so to declare to the satisfaction of the assistant assessor receiving such returns or lists, such assistant assessor is hereby required to make returns or lists of such persons neglecting or refusing, as in cases of persons neglecting or refusing to make the returns or lists required by the acts aforesaid, and to assess the duty

* Article I, § 2.
† 13 Stat. at Large, §§ 105, 120, pp. 276, 283.
‡ 14 Id. 98.

thereon, and to add thereto the amount of penalties imposed by law in cases of such neglect or refusal. And whenever the rates and amounts contained in the returns or lists as aforesaid, shall be stated in coined money, it shall be the duty of each assessor receiving the same, to reduce such rates and amounts to their equivalent in legal tender currency, according to the value of such coined money in said currency, for the time covered by said returns. And the lists required by law to be furnished to collectors by assessors shall in all cases contain the several amounts of taxes or duties assessed, estimated or valued in legal tender currency only."

Prior acts of Congress had authorized the issue of United States notes, commonly called legal tender notes. The act first authorizing their issue, an act of February 25, 1862,* enacted—

"Such notes shall be receivable in *payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States* (except duties on imports), and of all claims and demands *against* the United States, of every kind whatsoever (except for interest on bonds and notes, which shall be paid in coin), *and shall also be lawful money and a legal tender in payment of all debts public and private, within the United States* (except duties on imports and interest as aforesaid). And such United States notes shall be received *the same as coin at their par value*, in payment of any loans that may be hereafter sold or negotiated by the Secretary of the Treasury, and may be reissued from time to time, as the exigencies of the public interests shall require."

With these acts in force, the Pacific Insurance Company, a corporation engaged in the business of insurance in California, made returns upon the amounts insured, renewed, &c., by it, upon its premiums and assessments, and finally upon its dividends, undistributed sums, and income; all as required by the statute; the correctness of all the returns being conceded. The different sources of income thus returned had been received by the company in coined money

* 12 Stat. at Large, 345, § 1.

(the currency of California), and the amounts as returned were the amounts in that form of currency. The aggregate tax under the statute upon this sum of coin was $5376. The assessor then (against the protest of the insurance company) added to the amounts as returned, the difference in value between legal tender currency and coined money during the time covered by the returns; and fixing the tax upon the sum as thus increased, the aggregate amount of the tax came to $7365. The collector demanded payment of this sum. The company refused to pay the $7365, but tendered the $5376 in legal tender notes. The collector refusing this, and having seized and being about to sell the insurance company's property, the company paid the larger sum, $7365, under protest. The suit below was to recover back the amount wrongly paid. The case coming on to be heard upon demurrer, the court was divided in opinion upon seven questions, reducible, as this court considered, in substance to these two:

1. Whether that portion of the ninth section of the internal revenue act of July, 1866, above quoted, "is to be construed as merely providing a rule as to the currency in which accounts, returns, and lists are to be stated, with a view to uniformity in keeping the accounts of internal revenue, or whether it is to be construed as denying to a person who has received in coined money, incomes or other moneys subject to tax or duty, the right to return the amount thereof in the currency in which it was actually received, and to pay the tax or duty thereon in legal tender currency, and be construed to require that the difference between coined money and legal tender currency shall be added to his return when made in coined money, and that he shall pay the tax or duty upon the amount thus increased?"

2. (Sixth in the series.) Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not *direct* taxes within the meaning of the Constitution?

Mr. Wills, for the Insurance Company:

As to the first question. The undertaking made between the government and the citizen, by Congress, when issuing

the notes called legal tenders, was that in *all* transactions between the government and the citizen, other than in two excepted cases stated, the paper dollar should be equivalent to the coin dollar, and in nothing is this contract made more expressly than in regard to the subject of internal taxation in all its branches. In other words, the government, as the taxing power, agrees that it will receive at par the notes issued by it as a debtor, in payment of all internal taxes due to it as the taxing power. It is therefore estopped from regarding them as below par, for any purpose relating to the subject of internal taxation, including the assessment as well as the payment of that class of taxes.

The portion of the ninth section of the Internal Revenue Act of 1866 in question cannot therefore be held to deny to any man who actually receives his income in coin—a form in which income is universally received in California where this case comes from—the right to pay his tax on such income, in notes of the government, at the value expressed on their face.

As to the second question. The ordinary test of the difference between *direct* and *indirect* taxes, is whether the tax falls ultimately on the tax-payer, or whether, through the tax-payer, it falls ultimately on the consumer. If it falls ultimately on the tax-payer, then it is *direct* in its nature, as in the case of poll taxes and land taxes. If, on the contrary, it falls ultimately on the consumer, then it is an *indirect* tax.

Such is the *test*, as laid down by all writers on the subject. Adam Smith, who was the great and universally received authority on political economy, in the day when the Federal Constitution was framed, sets forth a tax on a person's revenue to be a direct tax.* Mill,† Say,‡ J. R. McCulloch,§ Lieber,‖ among political economists, do the same in specific

* Wealth of Nations, vol. 3, p. 331.

† Elements of Political Economy, p. 267; Political Economy, vol. 2, 371, 382.

‡ Political Economy, 466.

§ Treatise on Taxation, pp. 125, 126, 134.

‖ New American Cyclopedia, vol. 7, p. 155.

language. Mr. Justice Bouvier, in his learned Law Dictionary, defines a capitation tax, "A poll tax; an imposition which is yearly laid on each person according to his estate and ability."

[The counsel quoting a learned brief of Mr. W. O. Bartlett, then went into an examination of the opinions of Chief Justices Ellsworth and Marshall, Oliver Wolcott, Madison, and others, to show that in their opinion, a tax like the present one would fall within the nature of a direct tax.]

Indeed, it is obvious that an income tax, levied on the profits of any business, does not fall ultimately on the consumer or patron of that business, in any other sense than that in which a poll tax or land tax may be said ultimately to fall, or be charged over by the payer of those taxes upon the persons with whom and for whom they do business, or to whom they rent their lands. The refinement which would argue otherwise, abolishes the whole distinction, and under it all taxes may be regarded as *direct* or *indirect*, at pleasure.

But, if the distinction is recognized (and it must be, for the Constitution makes it), then it follows, that an income tax is, and always heretofore has been, regarded as being a direct tax, as much so as a poll tax or as a land tax. If it be a direct tax, then the Constitution is *imperative* that it shall be *apportioned*.

If it be argued that an income tax *cannot* be apportioned, then, it cannot be levied; for only such direct taxes can be levied as *can* be apportioned.

But an income tax can be apportioned as easily as any other direct tax; first, by determining the amount to be raised from incomes throughout the United States, and then by ascertaining the proportion to be paid by the people of each State. An income tax, in the matter of its apportionment, is not embarrassed by any other difficulties than those which grow out of apportionment, in the admitted cases of poll taxes and land taxes.

Mr. Evarts, Attorney-General, contra:

It was clearly the object of the act, to compel parties to

Reply for the tax-payer.

pay the legal percentage on their incomes, estimating them at their value in legal tender currency. If the reduction of all incomes to a legal tender standard was intended for no other purpose than to establish a uniform system in keeping the accounts of the internal revenue department, it is difficult to understand, *first*, why, in case of refusal to declare in which currency the income return is made, the assessor should be entitled to disregard the return, and exact, over and above the regular income tax, a *penalty* of twenty-five per cent.; and why "the lists required by law to be furnished to collectors by assessors" are required "in all cases to contain the several amounts of taxes assessed, estimated or valued in legal tender currency only?" If the collector's lists are to contain these amounts, these are the amounts to be collected and paid. This is evident from other provisions of the internal revenue law. Thus, by section 20 of act of June 30, 1864, as amended by act of July 13, 1866,* as soon as the assessment has become perfect, the assessor is to make out the list and send it to the collector, and this list is the guide of the collector in the collection of the tax; and by section 34 of same act, as amended,† the collector is charged with the amount of taxes as stated on the face of the lists, and credited with the amount of his collections.

The collector's duty is plain: to collect the amount set forth in the assessment list. The corresponding duty of the party taxed is equally clear, namely, to pay this amount.

The language of the law is in harmony with the obvious intention of those who framed it, which was to adopt one uniform standard for the computation, assessment and payment of taxes of this description.

The other question is one which seems settled by the case of *Hylton* v. *United States*, unanimously decided after able argument.‡

Reply: It is undoubtedly to *dicta* of the judges in *Hylton* v.

* Stat. at Large for 1865-6, p. 103. † Ib. 110. ‡ 3 Dallas, 171.

United States, to the effect that a capitation tax and a tax on land are the principal, if not the only, direct taxes within the meaning of the Constitution, that the general acquiescence in the unapportioned income tax is, in a great degree, attributable. The case was as follows: Hylton kept one hundred and twenty-five chariots; they were taxed by the United States, and the Supreme Court held that the tax was indirect, and did not require to be laid according to the rule of apportionment. The decision of the particular case before the court was probably correct. It is impossible that a man could have kept so many carriages for himself and his family only to ride in; and, although he is stated in the report of the case to have kept them for his own use, it is presumed that the use referred to was the conveyance of passengers for hire; in other words, that the one hundred and twenty-five chariots pertained to a line of stage-coaches. If this was the fact, the tax was indirect; for the tax-payer could charge it all over to his passengers by making a slight addition to their fare. But although the decision of the case before the court appears, for the reason stated, to have been correct, positions were taken, in the opinions of the judges delivered on the occasion, which are wholly untenable.

The court, at the time, was without a chief justice. Mr. Ellsworth was sworn in on the day of the decision, and took no part in it; and the case was decided at a very early day, and before the Supreme Court had acquired the high position which it afterwards attained. One of the judges, in delivering his opinion, speaks of it as a "discourse;" they all evince some want of knowledge of the subject which they discuss. These discourses shine in the light shed back upon them by the great intellect which for so many years illuminated the decisions of this tribunal—the illustrious Marshall—with whose grandeur of fame we naturally associate ideas of the Supreme Court.

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiff brought an action to recover back certain taxes upon its business and income, which it had paid to

the defendant upon compulsion and under protest. The defendant demurred to the plaintiff's complaint. Upon the argument of the demurrer, the opinions of the judges of the Circuit Court were opposed upon seven questions, which are set forth in the record. According to the view which we take of the case, it will be sufficient to answer two of them. They cover the entire grounds of the controversy between the parties, and their determination will be conclusive.

They are the first and the sixth. The first is:

"Whether that portion of the ninth (9th) section of the act of Congress, approved July 13, 1866, entitled 'An act to reduce internal taxation,' and to amend an act, entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30th, 1864, and acts amendatory thereof, which provides as follows, to wit:

'That it shall be the duty of all persons required to make returns or lists of income, and articles or objects charged with an internal tax, to declare in such returns or lists whether the several rates and amounts therein contained, are stated according to their values in legal tender currency, or according to their values in coined money; and in case of neglect or refusal so to declare, to the satisfaction of the assistant assessor receiving such returns or lists, such assistant assessor is hereby required to make returns or lists for such persons neglecting or refusing, as in cases of persons neglecting or refusing to make the returns or lists required by the acts aforesaid, and to assess the duty thereon, and to add thereto the amount of penalties imposed by law in cases of such neglect or refusal. And whenever the rates and amounts contained in the returns or lists as aforesaid, shall be stated in coined money, it shall be the duty of each assessor, receiving the same, to reduce such rates and amounts to their equivalent in legal tender currency, according to the value of such coined money in said currency, for the time covered by said returns. And the lists required by law to be furnished to collectors, by assessors, shall, in all cases, contain the several amounts of taxes or duties assessed, estimated or valued in legal tender currency only'—

is to be construed as merely providing a rule as to the currency in which accounts, returns, and lists are to be stated, with a view to uniformity in keeping the accounts of internal revenue,

or whether it is to be construed as denying to a person who has received, in coined money, incomes or other moneys subject to tax or duty, the right to return the amount thereof in the currency in which it was actually received, and to pay the tax or duty thereon in legal tender currency, and be construed to require that the difference between coined money and legal tender currency shall be added to his return, when made in coined money, and that he shall pay the tax or duty upon the amount thus increased."

We think there can be no doubt as to the proper solution of this question. A brief analysis of the provisions of the statute which bear upon the subject, will be sufficient to maintain the conclusion at which we have arrived.

1. The person making the return is required to declare whether the amounts set forth in it are stated according to their value in legal tender currency or in coined money.

2. If he fail to do so, he is subjected to a penalty, and the assessor is required to make the returns for him.

3. The list, with all the amounts therein stated, according to their values in legal tender currency, is to be placed by the assessor in the hands of the collector.

4. The collector is charged with the aggregate amount, and credited with his collections and otherwise, as is provided by the statute.

5. The taxes are made a lien, and, in default of payment, property is to be seized and sold by the collector. Both personal and real estate are liable. Full directions are given for the conduct of the proceedings.

The meaning of the statute, examined by its own light, is so clear that argument or illustration is unnecessary. It was the object of Congress to provide a uniform basis of taxation, in order to secure uniformity in the burdens imposed. "Equality is equity." According to the theory of the plaintiff, it had a right to have the assessment made upon the amounts received in coin, and to pay in currency, while others, whose receipts were in currency, were to be taxed upon that basis, and to pay in the same medium as the plaintiff. Such a result would be subversive of the

plainest principles of reason and justice. It cannot be supposed that such was the intention of those who framed the law. Certainly nothing in its language would warrant the construction contended for.

Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government.

To this question it must be answered, that the statute *did* deny to the plaintiff the right to have the assessment made otherwise than as it was made by the assessor; and that it required the plaintiff to pay the amount of the taxes set forth in the list delivered by the assessor to the collector, and which was paid by the plaintiff, under protest, as appears by the record.

II. The sixth question is:

"Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not *direct taxes*, within the meaning of the Constitution of the United States."

In considering this subject, it is proper to advert to the several provisions of the Constitution relating to taxation by Congress.

"Representatives shall be apportioned among the several States which shall be included in this Union, according to their respective numbers," &c.*

"Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."†

"No capitation or other direct tax shall be laid, unless in pro-

* Art. 1, § 2. † Ib. 1, § 8.

portion to the census of enumeration hereinbefore directed to be taken."

"No tax or duty shall be laid on articles exported from any State."*

These clauses contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void. This test must be applied in the examination of the question before us. If the tax to which it refers, is a "direct tax," it is clear that it has not been laid in conformity to the requirements of the Constitution. It is therefore necessary to ascertain to which of the categories, named in the eighth section of the first article, it belongs.

What are *direct taxes*, was elaborately argued and considered by this court in *Hylton* v. *United States*,† decided in the year 1796. One of the members of the court, Justice Wilson, had been a distinguished member of the Convention which framed the Constitution. It was unanimously held, by the four justices who heard the argument, that a tax upon carriages, kept by the owner for his own use, was not a *direct tax*. Justice Chase said:

"I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit: a capitation or poll tax simply, without regard to property, profession, or any other circumstance, and a tax on land."

Patterson, Justice, followed in the same line of remark. He said:

"I never entertained a doubt that the principal, I will not

* Art. 1, § 9.

† 3 Dallas, 171.

say the only, object the framers of the Constitution contemplated as falling within the rule of apportionment, was a capitation tax and a tax on land. . . . . The Constitution declares that a capitation tax is a direct tax; and both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms 'direct taxes,' and 'capitation and other direct tax,' are satisfied."

The views expressed in this case are adopted by Chancellor Kent and Justice Story, in their examination of the subject.*

Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than "taxes." It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of "imposts."†

Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition.‡ Cowell says it is distinguished from custom, "because custom is rather the profit which the prince makes on goods shipped out."§ Mr. Madison considered the terms "duties" and "imposts" in these clauses as synonymous.‖ Judge Tucker thought "they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excises.'"

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.¶

* 1 Kent's Commentary, 267; Story on the Constitution, 670. See, also, Rawle on the Constitution, 8; The Federalist, No. 84; and Tucker's Blackstone, Appendix, 294.

† Tomlin's Law Dictionary, title "Duty;" 1 Story on the Constitution, § 952; Hylton v. United States, 3 Dallas, 171.

‡ Story's Const. Abr., § 474.

§ Cowell's Interpreter, title "Impost."

‖ 1 Story's Constitution, 669, note.

¶ Bateman's Excise Law, 96; 1 Story's Constitution, § 953; 1 Blackstone's Commentary, 318; 1 Tucker's Blackstone, Appendix, 341.

The taxing power is given in the most comprehensive terms. The only limitations imposed are: That *direct taxes*, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

It has been held that Congress may require direct taxes to be laid and collected in the Territories as well as in the States.*

The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.

The other questions certified up, are deemed to be sufficiently answered by the answers given to the first and sixth questions.

ANSWERS ACCORDINGLY.

* Loughborough *v.* Blake, 5 Wheaton, 317.

Statement of the case.

WARD v. SMITH.

1. The designation of a bank as the place of payment of a bond, imports a stipulation that its holder will have it at the bank when due to receive payment, and that the obligor will produce there the funds to pay it.
2. If the obligor is at the bank, at the maturity of the bond, with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay.
3. Where an instrument payable at a bank is lodged with the bank for collection, the bank becomes the agent of the payee to receive payment.
4. Where such instrument is not lodged with the bank, whatever the bank receives from the maker to apply upon the instrument, it receives as his agent, not as the agent of the payee.
5. Without special authority, an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community.
6. The doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered.
7. If the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of States in rebellion and citizens of States adhering to the National government in the late civil war, it can only apply when the money is to be paid to the belligerent directly; it cannot apply when there is a known agent appointed to receive the money, resident within the same jurisdiction with the debtor. In this latter case the debt will draw interest.

ERROR to the Circuit Court of Maryland.

In August, 1860, William Ward, a resident of Alexandria in Virginia, purchased of one Smith, of the same place, then administrator of the estate of Aaron Leggett, deceased, certain real property situated in the State of Virginia, and gave him for the consideration-money three joint and several bonds of himself and Francis Ward. These bonds, each of which was for a sum exceeding four thousand dollars, bore date of the 22d of that month, payable, with interest, in six, twelve, and eighteen months after date, "*at the office of discount and deposit of the Farmers' Bank of Virginia, at Alexandria.*"

Statement of the case.

In February, 1861, the first bond was deposited at the bank designated for collection. At the time there was indorsed upon it a credit of over five hundred dollars; and it was admitted that, subsequently, the further sum of twenty-five hundred dollars was received by Smith, and that the amount of certain taxes on the estate purchased, paid by the Wards, was to be deducted.

In May, 1861, Smith left Alexandria, where he then resided, and went to Prince William County, Virginia, and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds, which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, William Ward deposited with the bank to his credit at different times, between June, 1861, and April, 1862, various sums, in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank indorsed the several sums thus received as credits on the first bond; but he testified that he made the indorsement without the knowledge or request of Smith. It was not until June, 1865, that Smith was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and to the Wards, obligees in the bond, of his refusal. The cashier thereupon erased the indorsements made by him on the bond.

Smith now brought the present action upon the three bonds to recover their entire amount, less the sum credited on the first bond when it was deposited, the sum of twenty-five hundred dollars, subsequently received by the plaintiff, and the amount of the taxes paid by the defendants on the estate purchased.

The court below instructed the jury, that if they found that the defendants executed the bonds, the plaintiff was entitled to recover their amounts, less the credit indorsed on the first

one, and the taxes paid by defendants, and the subsequent payment to the plaintiff with interest on the same. The plaintiff recovered, and the defendants brought the case to this court by writ of error.

Messrs. Brown and F. W. Brune, for the plaintiffs in error:

1. When securities are left with a bank for collection, the bank is, *ipso facto*, made the agent of the payee, to receive payment thereof. It is the agent of the payee, not of the payer.*

2. The bank may release the payer by receiving payment in gold, silver, copper, drafts, or checks on other banks or private bankers, bank notes of its own or other banks, circulating at par or below par.

It matters not what may be the particular kind or forms of money accepted by the bank, its relation of agent towards its principal and the debtor ceases the moment the funds so received are mingled with its own funds, and credit is given on its books for the amount so collected as cash.

The relationship of debtor and creditor, from that moment, subsists between the bank and its former principal, and the bank is liable for the full amount so credited.†

3. It was stipulated in the bonds that they should be payable at the Farmers' Bank; and it was thus made part of the contract that all the bonds should be deposited in that bank by the payee, Smith, at maturity, or before; so that the obligors might be able to make payment of them at the bank, according to the law and usage of banks, in making collections and receiving payments.‡

It is not pretended that the payee, Smith, gave any instructions to the bank, or made any communication to the

* Marine Bank v. Fulton Bank, 2 Wallace, 252.

† Wallace v. McConnell, 13 Peters, 136, 150; Bank of the United States v. Bank of Georgia, 10 Wheaton, 333, 341, 344, 346, 347; Levy v. Bank of the United States, 4 Dallas, 234; Marine Bank v. Birney, 28 Illinois, 90; Same v. Rushmore, Id. 468; Tinkham v. Heyworth, 31 Illinois, 522.

‡ Fitler v. Beckley, 2 Watts and Sergeant, 468, 462; Brabston v. Gibson, 9 Howard, 263, 279.

obligors, attempting to modify or qualify the general law and practice of banks in reference to such matters.

4. The defendants were entitled to have credited to them the notes they deposited at the bank for the plaintiff, either at their par or actual value; and the court erred in allowing them only the three previous credits mentioned in its instruction; and in allowing plaintiff interest on the entire balance during the war.*

Messrs. R. J. and J. L. Brent, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The defendants claim that they are entitled to have the amounts they deposited, at the Farmers' Bank in Alexandria, credited to them on the bonds in suit, and allowed as a set-off to the demand of the plaintiff. They make this claim upon these grounds: that by the provision in the bonds, making them payable at the Farmers' Bank, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted, whether the instruments were or were not deposited with it, the agent of the plaintiff for their collection; and that as such agent it could receive in payment, equally with gold and silver, the notes of any banks, whether circulating at par or below par, and discharge the obligors.

We do not state these grounds in the precise language of counsel, but we state them substantially.

It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the

* Jackson Ins. Co. v. Stewart, 15 American Law Reg. (6 New Series), 732, and note, 735; Tucker v. Watson, Id. 220; Brewer v. Hastie, 3 Call, 22; Hoare v. Allen, 2 Dallas, 102; Foxcraft v. Nagle, Id. 132; Letter of Mr. Jefferson, 1 American State Papers, pp. 257, 304–312.

funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no farther, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorized to receive in its payment depreciated notes of the banks of Virginia. The fact that those notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor re-

deemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

In *Ontario Bank* v. *Lightbody*,* it was held that the payment of a check in the bill of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge.†

The objection that the bonds did not draw interest pending the civil war is not tenable. The defendant Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies, during war of their respective countries, is applicable to debts between citizens of States in rebellion and citizens of States adhering to the National government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he re-

* 13 Wendell, 105.

† Story on Promissory Notes, § 115, 389; Graydon v. Patterson, 13 Iowa, 256; Ward v. Evans, 2 Lord Raymond, 930; Howard v. Chapman, 4 Carrington & Payne, 508.

ceive the money, will violate the law by remitting it to his alien principal. "The rule," says Mr. Justice Washington, in *Conn* v. *Penn*, "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money."* Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul* v. *Christie*.†

Here the principal debtor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between Marbury, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor being within the Union lines could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not in that event an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

JUDGMENT AFFIRMED.

* 1 Peters's Circuit Court, 496; Denniston *v.* Imbrie, 3 Washington do. 396.

† 4 Harris and McHenry, 161.

CONFISCATION CASES.

1. An informer, in prosecutions under the act of August 6th, 1861, which subjects to confiscation, upon libel filed, property whose owner used or consented to its use in aiding the rebellion, has no vested interest in the subject-matter of the suits; and this, notwithstanding that the act declares that where any person files an information with the Attorney of the United States (as the act allows any person to do), the proceedings shall be "for the use of such informer and the United States in equal parts."
2. Hence, the Attorney-General may properly, and against the interest and objection of the informer, ask a dismissal of an appeal to this court in cases where the decree below, having been against it, the government has appealed; and in the same way ask, upon agreement to that effect with the counsel of the claimants, for a reversal of a decree, where, on decree against them, the appeal has been by the other side, and for a remand of the cause to the court below, with directions to it to dismiss the libel.

THE question in this case arose upon a motion of Mr. Evarts, Attorney-General, in fifteen appeals from the Eastern District of Louisiana, in which judgments had been given on libels for condemnation and forfeiture—as having been employed in aid of the rebellion, with the consent of the owners—against the Trent and five other vessels, from which judgments the owners of the vessels appealed; and given in favor of the Eleanor and eight other vessels, from which the United States appealed.

Mr. Justice CLIFFORD stated the case more particularly, prior to delivering, as hereinafter, the opinion of the court.

Property owned by any person who knowingly uses or employs the same, or who consents to the use or employment of the same in aiding, abetting, or promoting insurrection against the government of the United States, under the conditions specified in the first section of the act of the 6th of August, 1861, is declared by that act "to be lawful subject of prize and capture," and all property purchased, acquired, sold, or otherwise transferred, with intent that the same may be so used or employed, is also declared to be

subject to the same proceedings, and the provision is, that it shall be the duty of the President to cause the same to be seized, confiscated, and condemned.*

Proceedings for the condemnation of such property may be instituted by the Attorney-General, or by any district attorney for the district in which the property is situated at the time the proceedings are commenced, and the third section provides, that in such cases "the proceedings are wholly for the benefit of the United States;" but the same section also provides, that "any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts."

Pursuant to those provisions libels of information were filed in these cases by the district attorney of the United States for the Eastern District of Louisiana, in the Circuit Court of the United States for that district, in which it was alleged that the steamer Eleanor was seized on the 15th of June, 1865, and that the steamer Trent was seized on the 30th of June in the same year.

Apart from the names of the vessels, and the time when the respective seizures were made, the allegations of the libels are similar in every respect material to this investigation. They were addressed to the judges of the Circuit Court for that district, and the introductory allegation in each states that the district attorney prosecutes for the United States, and in the name and behalf of the United States and Charles Black, informant, against the respective steamers, their tackle, apparel, and furniture, and the prayer of the respective libels is for process of monition, order of publication, and for a decree of condemnation to the use and ownership of the United States and of the informant.

Both steamers were seized, and process was served in each case; but the steamers were afterwards released by the order of the court, made at the request of the claimants, who respectively gave bonds for their appraised value. Subsequent proceedings in the two cases were in all respects

* 12 Stat. at Large, 319.

the same, except that the decree in the first case was for the claimants, and in the second for the United States, and the losing party in each case appealed to this court. Other appeals in like cases were entered in this court at the same term, and they have remained on the calendar to the present time.

Early in the present term some of the cases were heard upon the merits; but these cases now come before the court on certain motions made in behalf of the United States by the Attorney-General. His motion in the first case is for leave to dismiss the libel of information; and in the second case, his proposition is to the effect that the decree of the Circuit Court, which was in favor of the United States, shall be reversed, and the cause remanded, with a view that the same may be dismissed in the court where the suit was instituted. When the motions were made they were taken under advisement; but the court subsequently decided that the motions ought to be granted, unless the informer desired to be heard in opposition to the discontinuance of the prosecutions. Since that time the informer has been heard,* and the court has come to the conclusion that the respective motions must be granted.

Provision was made by the thirty-fifth section of the Judiciary Act for the appointment of an attorney of the United States in each district, and the same section makes it his duty to prosecute in such district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court, in the district in which that court shall be holden.†

In the prosecution of suits in the name and for the benefit of the United States, the seventh section of the act of the 15th of May, 1820, provided that the district attorneys should conform to such directions and instructions as they

* He was represented here by Messrs. C. Cushing and B. Butler.—REP.

† 1 Stat. at Large, 92.

should receive from the agent of the treasury; but the first section of the act of the 2d of August, 1861, devolves the general superintendence and direction of district attorneys, as to the manner of discharging their respective duties, upon the Attorney-General of the United States.*

Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, except in cases where it is otherwise provided in some act of Congress.

Civil suits, in the name and for the benefit of the United States, are also instituted by the district attorney, and, in the absence of any directions from the Attorney-General, he controls the prosecution of the same in the district and circuit courts, and may, if he sees fit, allow the plaintiffs to become nonsuit, or consent to a discontinuance.

Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office.†

Under the rules of the common law it must be conceded that the prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his option, and without other liability to his adversary than the payment of taxable costs which have accrued up to the time when he withdraws his suit.‡

Precisely the same rule prevails in the admiralty courts, and consequently the libellant has the right at any stage of

* 8 Id. 596; 12 Id. 285.

† 11 Stat. at Large, 51; Levy Court *v.* Ringgold, 5 Peters, 454; United States *v.* Corrie, 23 Law Rep. 145; United States *v.* Stowell, 2 Curtis, 153; United States *v.* McAvoy, 4 Blatchford, 418; The Peterhoff, Blatch. Prize Cases, 463; The Anna, Ib. 337.

‡ 1 Tidd's Practice, 628.

the cause voluntarily to discontinue the same, and the only penalty to which he can legally be subjected, in the absence of any statutory regulation, except, perhaps, in prize cases, is the payment of the costs of the proceedings.*

Although the name of the informer in these cases is mentioned in the libel of information, still it is nevertheless true that the suit was instituted by the district attorney in the name and for the benefit of the United States. Control of these suits, therefore, while they were pending in the Circuit Court, belonged to the district attorney under the general superintendence and direction of the Attorney-General, and he might, if he had seen fit, have discontinued them at any stage of the proceedings prior to the appeals. Such control on the part of the district attorney ceases whenever such a suit, civil or criminal, is transferred to this court by writ of error, appeal, or certificate of division of opinion, as the thirty-fifth section of the Judiciary Act also provides, that it shall be the duty of the Attorney-General to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time. Appointed, as the Attorney-General is, in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed in the respective motions under consideration, but if more be needed, it will be found in the case of *The Gray Jacket*,† in which this court decided that in such suits no counsel will be heard for the United States in opposition to the views of the Attorney-General, not even when employed in behalf of another of the executive departments of the government.

Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are

* The Oriole, Olcott, 67.

† 5 Wallace, 370.

subject to the direction, and within the control of, the Attorney-General.

Objection is made to the granting of the motions, in these cases, upon the ground that it would impair the vested rights of the informer, mentioned in the respective libels of information. Argument for the informer is, that the allegations of the libels afford presumptive evidence that he filed the informations with the district attorney, and that the third section of the act provides that, in that state of the case, the proceedings shall be for the use of such informer, and the United States, in equal parts. Perhaps the better opinion is, that the allegations of the libels, in case of condemnation, would afford *primâ facie* evidence that the person therein named, as the informer, is entitled to be regarded in that character; but the more important inquiry in this case is, whether he possesses any such interest in the property seized, before final condemnation, as will prevent the Attorney-General from dismissing the suits, as proposed in the motions? Much aid will be derived, in the solution of that question, by a comparison of the third section of the act, invoked as supporting the views of the informer, with similar provisions in other acts of Congress, upon analogous subjects. Regulations were prescribed for the distribution of fines, penalties, and forfeitures, in the first act passed by Congress for the collection of maritime duties, including forfeitures arising from seizures on navigable waters, as well as on land, and the same provisions, in substance and effect, were incorporated into the act of the 2d of March, 1799, which for many purposes, remains in force to the present time.*

Those regulations direct that one moiety of the fines, penalties, and forfeitures recovered by those acts, after deducting all proper costs and charges, shall be paid into the treasury, and that the other shall, in certain cases, be divided, in equal proportions, between the collector, naval officer, and surveyor of the port; and, in other cases, that one-half of that moiety shall be given to the informer, and

* 1 Statutes at Large, 48, 697.

the remainder only to the officers of the customs. Such fines, penalties, and forfeitures were required by those acts, to be sued for and recovered in the name of the United States, in any court competent to try and determine the controversy.

Questions of various kinds arose in the construction of those regulations, especially in cases where the claims of informers came in conflict with the assumed rights of subsequent purchasers, and with the action of the Secretary of the Treasury, in remitting such forfeitures under the act of Congress conferring that power upon the head of that department.*

Differences of opinion existed among the justices of this court, whether a forfeiture under those provisions, or others of like character, gave such a title to the United States as to overreach a *bonâ fide* sale to an innocent purchaser, when made before seizure and suit for condemnation, but the majority of the court adopted the affirmative of that proposition.†

No one, however, contended that any such rule could be applied, in any way, except by relation back to the criminal offence, in cases where the title had been consummated by seizure, suit, and judgment, or decree of condemnation. Next controversy arose between the collector and the heirs-at-law of his predecessor, in a case where the seizure had been made by the latter, in his lifetime, and while he was in office, but the decree of condemnation was not entered till after his decease, and the appointment of his successor. Payment of the amount, as ordered in the decree of distribution, was made to the collector in office at the date of the decree, but the court held that the money belonged to his predecessor, in consequence of the inchoate right which he acquired, by virtue of the seizure, and the incipient steps taken by him to cause the suit to be instituted.‡

* 1 Statutes at Large, 506, 626.

† United States *v.* Bags of Coffee, 8 Cranch, 404; The Mars, Id. 417.

‡ Jones *v.* Shore's Exrs., 1 Wheaton, 468.

Express ruling of the court in that case was, that the right of the collector to forfeitures *in rem*, attached on the seizure, but that the right must be defined and consummated by the judgment or decree. Authority to remit such fines, penalties, and forfeitures, was conferred upon the Secretary of the Treasury, by the act of the 3d of March, 1797, and the next important controversy which arose upon the subject, was as to the extent of that authority, and whether the secretary could remit the share of the informer, or that of the officers of the customs, subsequent to the judgment or final decree.

Just prior to the decision, in the case of *Jones* v. *Shore's Exrs.*, Judge Story ruled, in the Circuit Court, that the right of the collector, antecedent to the judgment or decree, was merely inchoate, but he added, what was not necessary to the decision of the case, that his right to the forfeiture vested absolutely with the final sentence of condemnation, and that, after judgment, it could not be remitted by the Secretary of the Treasury.*

Unguarded expressions, supposed to support the same conclusion, are also employed in some of the prior, as well as subsequent, decisions of this court.†

Doubts arose whether the secretary could remit a forfeiture or penalty, accruing under the several acts, subsequent to the final decree or judgment, but those doubts were soon removed by a unanimous decision of this court, and one which is characterized by accurate analysis, clear statement, and sound conclusions.‡

Merchandise was imported into the United States in violation of the non-intercourse act then in force, and the vessel and cargo were seized on that account, and were afterwards condemned as forfeited. Subsequent to the decree of condemnation, the Secretary of the Treasury remitted the whole forfeiture, and this court held that he did not exceed his

* The Margaretta, 2 Gallison, 515.

† Van Ness *v.* Buel, 4 Wheaton, 74.

‡ United States *v.* Morris, 10 Wheaton, 281.

authority; that neither the rights of the informer, nor the rights of the collector, or other officers of the customs, were violated in the case; that their rights were conditional, and subordinate to the power of remission; and that the secretary had authority, under that act, to remit a forfeiture, at any time before or after a final decree or judgment, until the money was actually paid over to the collector for distribution, and that the power to remit extends not only to the interest of the United States, in the forfeiture, but also to the share of the informer, and that of the officers of the customs.

Informations, to recover municipal forfeitures, whether the seizure was made on navigable waters or on land, must be instituted in the name of the United States, and they must be prosecuted, in the subordinate courts, by the district attorney, and in this court, when brought here by appeal, or by writ of error, by the Attorney-General. Where the seizure was made on navigable waters, the case belongs to the instance side of the subordinate court; but where the seizure was made on land, the suit is one at common law, and the claimants are entitled to a trial by jury.*

Mention of the name of the informer, in the information, in such cases, is not necessary, as he is not a party to the suit, nor is he entitled to be heard, as such, in any stage of the proceedings. He cannot institute the suit, nor move for process, nor join in the pleadings, nor take testimony, nor except to the ruling of the court, nor sue out a writ of error, or take an appeal. Judgment is for the claimants, or for the United States, and if for the latter, and the claimants do not remove the cause into this court for revision, it then becomes the duty of the court to render the decree for distribution. Prior to such a decree, the interest of the informer is conditional, and under the decisions of this court it continues to be so until the money is paid over, as required by law.†

* 3 Greenleaf on Evidence, § 896; 1 Kent's Com. (11th ed.), 387; The Sarah, 8 Wheaton, 394; Armstrong's Foundry, 6 Wallace, 769.

† United States v. Morris, 10 Wheaton, 290.

Syllabus.

Viewed in any light, it is quite clear that the informer, in these cases, has no vested interest in the subject-matter of these suits, and that both motions ought to be

GRANTED.

The order in the first case is, that it be dismissed, and that order also disposes of Nos. 26, 27, 28, 29, 30, and 33, 34, and 35.

Order in the second case is, that the decree be reversed, as stipulated by the parties, and that the cause be remanded, with directions to dismiss the libel of information; and this order also disposes of Nos. 44, 46, 48, 63, and 64, on the calendar.

[See *supra*, 166, Dorsheimer v. United States.]

UNITED STATES v. ADAMS.

1. It is the duty of the Secretary of War, as head of the War Department, to see that contracts which belong to his office are properly and faithfully executed, whether he have made the contracts himself or have conferred authority on others to make them; and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or that those made by others were made in disregard of the rights of the government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates.
2. If there exist well-grounded suspicions, or facts unexplained, tending strongly to the conclusion that contracts have been entered into, and debts incurred, within a particular military district, in disregard of the rights of the government, the secretary has a right and is bound to issue an order to suspend the payment of all claims against it.
3. In such a case (especially where the military district in which the contracts were made and are to be carried into execution is one distant from Washington, where Congress and the Court of Claims sit, and a resort to these tribunals would occasion delay and expense), the appointment of a board of commissioners, to meet at once at the place where all the transactions out of which the claims and demands of which payment is now suspended originated — the appointment being for the simple purpose of affording to such claimants as might desire a tribunal to speedily

hear and decide upon their claims, without the delay and expense of resorting to those which the law had recognized or provided, and so to relieve them from the hardship resulting from the suspension of the payment, as far as was in the power of the secretary—is a fit measure to be taken by the secretary.

4. If the claimant voluntarily come before a board thus appointed, and present his claim, and the board investigate it, and Congress afterwards enacting that all claims allowed by such board shall be deemed to be due and payable, and be paid upon presentation of a voucher with the commissioners' certificate thereon—the petitioner do present his voucher and receive payment of the sum so allowed by the board, he cannot afterwards recover in the Court of Claims a balance which would remain on an assumption of the validity of his original contract.
5. These principles applied to contracts made in 1861 by General McKinstry, Quartermaster in the Western Military Division, under General Fremont, commanding, for mortar-boats and tug-boats, to be used by the army on the Western rivers during the late civil war.

APPEAL from the Court of Claims.

The suit was founded on the petition of Adams, claiming a balance against the government on contracts with General Fremont, commanding the Western Military District, for the construction of a certain number of mortar-boats and steam tug-boats, to be used on the Western rivers in the late civil war. The contracts were alleged to have been made on or about the 24th of August, 1861, for the mortar-boats, at a cost of $8250 each; and on or about the 10th of September following, for the steam tug-boats, at the cost of $2500 each. The petitioner was also to build cabins and pilot-houses, and construct steering apparatus, and windlasses on the steam-tugs, for which he was to receive the sum of $1800 in addition for each boat.

After these boats were constructed they were received into the service of the government by the orders of the Secretary of War. This was in the latter part of November, 1861. Previous to this, on the 14th of October, of that year, General Fremont was superseded in his command. And, in consequence of representations of *frauds and irregularities committed by General McKinstry, the chief quartermaster of the army of this military district*, who had charge of making contracts for supplies and materials necessary for equipping the troops for the expe-

dition contemplated, and who made the contracts, among many others, in question, the Secretary of War, by order of the President, suspended payments upon all contracts within the department until an investigation could be had into the charges thus made.

General McKinstry was afterwards dishonorably dismissed the service for frauds found to have been committed against the government while serving as chief quartermaster of this army. And, after his suspension, on the 25th of October, 1861, the secretary, by a like order, appointed a board of commissioners "to examine and report, to the Secretary of War, upon all unsettled claims against the military department of the West, that had originated prior to the 14th of October, 1861, the day General Fremont had been superseded." This board, composed of three gentlemen of the highest intelligence and character (Messrs. David Davis, Joseph Holt, and Hugh Campbell), met, without delay, at the city of St. Louis, the headquarters of the military department in which the irregularities and frauds in its administration, as charged, had been committed, and entered upon their duties; first giving notice to all persons holding claims against the government to present them for examination, with such proofs and explanations as the claimant might think proper to exhibit. Under this notice, the petitioner, on the 10th of December, 1861, presented his claims, which were as follows:

The United States to Theodore Adams, Dr.

For building 38 mortar-boats for the United States, as per order of Major-General Fremont, herewith attached, dated August 24, 1861, ...		$313,500 00
Deduct this amount, paid by Major McKinstry on the —— day of ——, ...	$75,000	
Deduct this amount, paid by Major A. Allen, quartermaster, 7th to 12th November, .	55,000	
Total to be deducted, ...		130,000 00
Balance due, ...		$183,500 00
On this account the commissioners allowed the petitioner		$75,959 24

Statement of the case.

The United States to Theodore Adams, Dr.

For building 4 hulls for tug-boats for the United States, as per contract herewith, dated September 10, 1861, by Major McKinstry, quartermaster, at $2500 each,	$10,000 00
For building 4 hulls for tug-boats for the United States, as per contract herewith, by Major McKinstry, quartermaster, dated September 21, 1861, at $2500 each,	10,000 00
For building 8 cabins for tug-boats for the United States, as per contract herewith, dated September 20, 1861, by Major McKinstry, quartermaster, for $1800 each,	14,400 00
	$34,400 00
Deduct amount already paid,	9,000 00
Balance,	$25,400 00
On this account the commissioners, deducting therefrom $5204 from the charge for tug-boats, allowed the petitioner	$20,196 00

For these several sums, $75,959.24 and $20,196.00, this board gave vouchers to the claimant as due from the government on these contracts, and *received from him a receipt in full of all demands, which he signed under protest.* When the papers were exchanged does not appear; but not long afterwards, on the 11th of March, 1862, Congress passed the following joint resolution:

"That all sums allowed to be due from the United States to individuals, companies, or corporations, by the commission heretofore appointed by the Secretary of War (for the investigation of military claims against the Department of the West) composed of David Davis, Joseph Holt, and Hugh Campbell, now sitting at St. Louis, Missouri, shall be deemed to be due and payable, and shall be paid by the disbursing officer, either at St. Louis or Washington, in each case upon the presentation of the voucher, with the commissioners' certificate thereon, in any form plainly indicating the allowance of the claim, and to what amount. This resolution shall apply only to claims and contracts for service, labor, or materials, and for subsistence, cloth-

ing, transportation, arms, supplies, and the purchase, hire, and construction of vessels."

Under this resolution the claimant and petitioner below presented his vouchers, and received payment of the several sums allowed by the board.

The present suit, as has already been said, was brought by him against the government to recover the balance of the contract price of the mortar and steam tug-boats, with their fixtures, over and above the amount allowed by the board, after an investigation into the merits and the payment of the same under this joint resolution.

The Court of Claims decided that he was entitled to recover that balance, and gave judgment for him against the United States for $112,748.76; finding, also, that the value of the mortar-boats and tug-boats was $274,408.80.

Mr. Hoar, Attorney-General, and Mr. Dickey, Assistant Attorney-General, for the appellants:

The case nowhere shows—the Court of Claims, we mean, has nowhere found as a fact— .

1st. That anybody had authority to make these contracts; or—

2d. That anybody ratified, or meant to ratify them; or—

3d. That there was any emergency which justified making them.

The whole case is:

1st. That during the late civil war General Fremont did contract for the boats; and,

2d. That, after they were built, they were taken by the government, under orders of the Secretary of War, into government use.

Now, it cannot be successfully maintained that Fremont had power, even in virtue of his office, to bind the government by contracts whose magnitude was limited only by his own judgment. His power can be maintained only by an unjust and most dangerous extension of a just and safe principle, the principle that all *appropriate* means are allowable to carry out *legitimate* ends.

Argument for the contractor.

As to the Secretary of War, he had no power, because the statute of May 1, 1820,* thus enacts:

"No contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except (1) under a law authorizing the same, or (2) under an appropriation adequate to its fulfilment; and excepting also (3) contracts for the subsistence and clothing of the army and navy, and (4) contracts by the Quartermaster's Department, which may be made by the secretaries of the departments."

The whole case of the claimants, therefore, must rest on a ratification of the contract, as matter of law, upon the facts of the case; in other words, upon an assumption that by the secretary's taking the boats and tugs into the service of the United States, void contracts, by force of ratification, become valid ones. But the fact that property came into the possession of, and was used by the government, has no tendency to prove that it was received under a contract for a specific price, which contract the agents of the government receiving it, had no legal power to make. The only thing which can be presumed, where goods are accepted by a party, in the absence of all contract about what he shall pay for them, is, that he will pay for them what they are reasonably worth. That is presumable enough. This case, therefore, afforded grounds for a *quantum meruit*. And it afforded nothing else. But a settlement, and receipt of the money, upon this basis of a *quantum meruit*, understood to be paid upon that footing, precludes the subsequent assertion of a special different contract. And that, we submit, is the sort of settlement and receipt which took place in this case.

Messrs. Carpenter and Wills, contra, for the appellee; and Messrs. Carlisle and Corwine for appellees in other cases argued with this and involving the same question in principle. A brief of *Mr. B. R. Curtis* being also filed in the present case.

* 3 Statutes at Large, 568, § 6.

1st. Had General Fremont power, under his authority as commanding general, to make these contracts?

In attempting to solve this question, it is in vain for the counsel of the government to seek the *full measure* of the authority of the commander of a military department, in time of war, either in the statutes of the United States or in the Regulations of the Army; for neither of them have attempted to define his powers.

It is true, that the Regulations of the Army declare that "the Ordnance Department furnishes all ordnance and ordnance stores for the military service,"* and that "the Quartermaster's Department provides the quarters *and transportation* of the army," &c.† But they are silent, and from the nature of the case, must be, on the great and essential points in time of war, of the plan of campaign, the ends to be attained, the ways and means of their attainment, and when, and where, and to what extent the services of these subordinate departments shall be required. They are but instruments, means to ends. The commanding general, on the contrary, in the execution of his plans, breathes into them life, and dictates the time, and place, and extent of their action. They work according to rule, it is true, but they work under his direction, and for the attainment of his ends. He is charged with the success of the campaign, and he alone is responsible for results, and for the manner in which he discharges that duty.

The war powers of Congress, and of the President, as commander-in-chief of the army and navy, and (as a necessary consequence) of his subordinate commanding generals in their several military departments, are *unlimited* in time of war, *except by the law of war itself.*

The rationale of this fundamental principle of law in war, may be stated in the language of Alexander Hamilton: It "rests upon two axioms, simple as they are universal: the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of the *end* is expected, ought

* Revised Regulations for 1861, Article 47, § 1375.

† Ib., Article 42, § 1064.

to possess the *means* by which it is attained." Chief Justice Marshall is explicit to the same effect.*

It is matter of public history, history which the court will judicially notice, that the mortar-boats were designed for the double purpose of pontoons for moving armies across rivers, and of floating batteries, for dislodging the enemy from fortified points on the river; and that the tug-boats were designed, among other general uses, to furnish the necessary motive power for towing them rapidly from point to point, in the descent of the river; and matter of public history, moreover, that they were used with success during the war.

The Venice,† in which the authority of law was given to a proclamation of General Butler, maintains the authority which we here assert for General Fremont.

The question of authority to make the contracts in this case may, therefore, be regarded as settled.

It was objected by the United States, after taking and using the boats, that, in point of fact, General Fremont agreed to pay *too much* for them; but that is a question which does not legitimately arise in the case. The only question is, whether the contracts were made by competent authority, and within the scope of the authority of the public agent who made them. That being shown, in the absence of fraud (which, if pretended, is not proven), the contract price becomes the law of the case.

But again. We go further. The authority of General Fremont being shown, even if it were admitted that he had not made a judicious bargain for the government in the matter of price, or be shown that he had received and violated private instructions in the matter of price, directing him to give what has been allowed by the St. Louis commission, and no more, nevertheless, under well-established principles of the law of agency, the government would be

* McCullough v. Bank of Maryland, 4 Wheaton, 409, 421; and see Whiting's "War Powers under the Constitution," 10th edit. 85, 77, 81. Note, 82–83, 167–168, 270, 307–308.

† 2 Wallace, 276, 278, 279.

bound by his contracts in the matter of price, because his instructions being *private*, and the subject-matter of the contracts being within the general scope of his authority, the claimant was justified in contracting with him as a public agent, possessed of full power to contract on its behalf.* The government, therefore, could not, in law, have disowned his contract, even if, after it was made, it had done so in fact.

It is denied on the other side, that the United States are bound by these contracts, because the Secretary of War could not authorize Fremont to make them; he being prohibited from making them by the act of May 1st, 1820.

But each of the exceptions in that act constitutes an alternative *condition*, the existence of which in any case takes the given case out of the prohibition of this law, and at the same time authorizes a contract to be made by the secretaries of the departments named. There can be no doubt that such contracts, from their nature and subject-matter, belonged to the Quartermaster's Department. Moreover the power to contract is not limited by the act to any particular form or mode of making the contract.

Conceding that General Fremont had no power as agent of the government to bind it. How stands the case then?

The case does not show that the appellee knew, or had any means of knowing what consultations had taken place, or what arrangements had been made, between General Fremont and the department. He did know that General Fremont undertook to contract in behalf of the United States; and there is no reason to doubt that he was induced to begin, prosecute and complete the work, in the faith that he was doing it under these special contracts with the United States. The moment that the boats were completed for service, which was of course at the earliest date practicable, they were surrendered into the possession of the United States, and under the authority of the Secretary of War they went into their military service. This amounts to an

* United States v. Arredondo et al., 6 Peters, 729.

adoption by the secretary of the contracts under and by force of which the boats had been built, and under which alone the United States were entitled to receive them. The transfer of the boats to the United States must be intended to have been made under and by force of some contract, express or implied, either for agreed sums, or for such sums as they were reasonably worth; for it will not be pretended either that the appellee made a gift of them to the government, or that they were taken by law under the right of eminent domain. Under some contract then the boats were delivered, and why not under the actually existing contracts. The appellee had acted throughout under those contracts. He had in all things conformed to their requirements. The boats were completed without any notice that the contracts were repudiated by the United States, and they were delivered and received into the military service of the United States.

If General Fremont had not lawful power to bind the United States, he undertook to do so, and the appellee *contracted and bound himself* as if the General had been the lawful representative of the United States. It was competent for the secretary to adopt and confirm a contract already agreed to, and thus to make a contract. And the acceptance of the boats for service, and the subsequent employment of them under his authority, is in judgment of law an adoption of the only agreements by force of which the boats had been built and were prepared for service.

The *actual intention* of the Secretary of War in receiving the boats and employing them in the public service, is not the subject of inquiry. As respects the United States, the secretary had power to acquire the title to the boats either for an agreed price or for a *quantum meruit*. But as respects the appellee, the secretary had no power to compel him to make a new contract or part with his property without any. By receiving the boats the secretary is conclusively presumed to have assented to the only terms on which the builder had signified his willingness to part with them; and the only terms on which the builder ever signified his will-

ingness to part with them were the *contract* terms. He never, in fact, agreed to a *quantum meruit*, and the secretary had no power to make him agree or fix his rights without any agreement. If the government, through its authorized agent, chose to repudiate the contracts made by General Fremont, they might have done so. But the government could not claim and take the property without any contract voluntarily made by the appellee, nor avail themselves of so much of the contract as gave them the title to the property, and repudiate so much of the contract as promised to pay for it.

It is argued that when goods are delivered under a void contract, the party retaining them impliedly promises to pay what they are reasonably worth. The rule has no application to this case. If the secretary had power to make the contracts, he had power to adopt and ratify them. Receiving the property necessarily has that legal effect; and therefore the property was not delivered and accepted under void contracts, but under contracts made valid by the act of acceptance.

Having accepted the boats, the conduct of the secretary in refusing to pay for them and disowning the contract, must be characterized as unusual, harsh, and unjustified. He appointed his commission without reference to the wishes or intentions of the contractors, and ignores and cuts off by a mere official order debts contracted in form. Can he do this? This question brings us to consider the next point.

2d. Is the receipt signed by the appellee a legal bar to his claim?

This inquiry is to be made under the concession that the appellee was justly entitled to rely on his special contracts with the government, and recover the contract prices stipulated therein, or at the least, was justly entitled to receive the actual worth of his work, labor, and materials, which have gone to the benefit of the government; and that he has not actually received either of them.

Now a receipt in full is merely the declaration of a fact. It is not a contract. It is open to explanation or contradic-

tion, like any other statement of facts. And if it appear, outside of the receipt, that the sum received was only parcel of the sum due, the legal claim for the residue is not satisfied.*

It is true that if there is a dispute between parties as to the amount of a claim, and they harmonize that dispute by an agreement that only a certain amount is justly due, and that amount is paid and received in full satisfaction of the claim, that is a bar; it may be pleaded as an accord and satisfaction. And this because there is an accord by the mutual agreement of the parties upon that sum, as what is mutually admitted to be what is justly due, and a satisfaction by the payment of that agreed sum.

The only remaining inquiry then is, whether what took place by reason of the action of the commissioners, amounts in law to an accord and satisfaction.

There is no warrant in the facts for this legal conclusion.

1. The claim presented by the appellee was a claim to be paid the contract prices.

2. The commissioners had no *legal* power whatever. They were agents of the executive government of the United States to ascertain, for the action of the executive government, as well as they could, what debts the government had incurred under certain contracts. But they had no power to increase or diminish any one of those debts; and still less had they any power to fix judicially and finally what any debt amounted to.

Before this provisional committee it appears that the appellee presented his claim. He did so, to a large extent, compulsorily. The commission being appointed, his necessities as contractor compelled him to go before it. This was a sort of duress.† But he stood on his contracts. The committee had no power to fix their validity or invalidity. He certainly did not concede their invalidity; for his claim before them was an

* Pinnel's Case, 5 Reports, 238; Fitch v. Sutton, 5 East, 230; Kellogg v. Richards, 14 Wendell, 116; Curtiss v. Martin, 20 Illinois, 577.

† See Proof v. Hines, Cases Tempore Talbot, 111.

assertion that his rights were governed by them alone. This claim they disallowed, and made known their determination that he was entitled to a less sum. They also insisted, and we think, without authority, that he must sign an acknowledgment that no more was due, *as a condition for obtaining the vouchers for that which the committee admitted to be due.* He signed to obtain the vouchers, *protesting* that his acknowledgment that the amount was all that was due, was not true, and was not freely assented to by him. How is it possible to make an accord and satisfaction out of this transaction?

It is true that if one does an act having a fixed and necessary legal operation, his protest accompanying that act that he does not do it, can have no effect. He does it, and saying that he does not is futile. But signing a receipt is not an act having a fixed and necessary legal operation. It is simply an admission of a fact, which carries with it *primâ facie* evidence of that fact, or it is evidence of an assent to a compromise of rights, and when it is relied on for the latter purpose, as it is here, if it appears that there was no actual assent to a compromise of rights, that the receipt was accompanied by a protest that they were not intended to be relinquished, and that the receipt was signed only under the pressure of necessity to obtain a part of the just dues of the creditor, the law is clear that it does not operate as a bar.

As to the act of Congress ordering the sums fixed by the committee to be paid, and the receipt by the appellee of the sum said to be due to him, it is not perceived how his fixed legal rights can have been affected thereby. Congress did not attempt to give any force to the action of the committee, further than to authorize the payment of the sums they had declared to be due. Any claims for a further sum, justly due from the United States on special contracts, does not appear to have been brought, in any way, to the notice of Congress. And certainly there is no presumption, wholly outside of the terms and subject-matter of this act, that Congress meant to dictate to any one having a just claim against the United States, that if he should accept what was thereby appropriated for him, he should be deemed

thereby to waive and abandon all further claim. Such waiver and abandonment is a substantive and important thing, and it is not provided for by the act, either in terms, or by any just implication.

Reply: It is not the receipt, or the decision of the commission, but the taking the voucher on the receipt, and taking the money under the act of Congress by means of it, which ended the affair.

As to duress. Can he who has a just claim against the United States be allowed to say, in its courts of law, that his means and prospects of obtaining justice were so deficient and inadequate that, in taking a sum of money from the government, paid to him in full satisfaction of it, he was acting under duress? We have, indeed, "diversities of administration;" but the same spirit of justice works in all. It is an old maxim of English law, that the *king* can do no wrong. It must, at least, be held by the highest judicial tribunal of this nation, that an apprehension of injustice from the United States cannot be rightfully assumed and adopted by any citizen as a rule of action, or asserted as a justification of any course of conduct otherwise indefensible.

Mr. Justice NELSON delivered the opinion of the court.

There has been a good deal of discussion between the learned counsel upon the questions, whether or not General Fremont possessed competent power, as commander of the military department, to make a valid contract with the petitioner for the construction of the boats, in the absence of any authority from the Quartermaster-General or Secretary of War; and if not, whether the delivery of the boats, acceptance by the secretary, and employment in the service of the government, did not operate as a ratification of the same? In the view the court have taken of the case, it is not material how these questions are answered. For the purposes of the decision, we may admit the competency of the power.

Opinion of the court.

The Secretary of War, subject to the authority of the President, is at the head of the department of the government on whom the duty devolved to provide these boats for the military expedition in contemplation by General Fremont, after their construction had been determined on. The head of the appropriate bureau of this branch of the service is the quartermaster-general, who is under the direction of the secretary.* And whether the contracts for the construction were made by General Fremont or by the quartermaster-general, the source of the authority is the head of the War Department. And whether he makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed; and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or those made by others were made in disregard of the rights of the government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates. This duty is too plain and imperative to call for comments. As the head of the department under whose charge the contracts were made and were being carried into execution, and over which he had the superintendence and control, he was responsible to the government for any detriment to its interests which it was reasonably within his power to prevent or remedy. We do not agree, therefore, that there was anything unusual, harsh, or unjustifiable on the part of the secretary, if there existed well-grounded suspicions or facts unexplained, tending strongly to the conclusion that contracts had been entered into, and debts incurred, within this military district, in disregard of the rights of the government, in issuing the order to suspend the payment of all claims against it. This was a proper if not an indispensable step to prevent the consummation of the frauds. He would have been recreant to his duty if he had acted otherwise; and

* 1 Stat. at Large, 696; 4 Id. 178; 5 Id. 257; Regulations of 1861, art. 1064.

after having thus suspended these claims upon grounds and for the reason stated, which we are of opinion fully justified him, unless some provision had been made affording an immediate opportunity to the claimants to exhibit their claims, and establish their justice and integrity, their only remedy would have been an appeal to Congress or to the Court of Claims, which, as then organized, had no power to render judgment against the government. Both these bodies were soon to be in session at Washington, so that, without any great delay, they could have been presented there, examined, and allowed or rejected. But these tribunals were distant from the place where these contracts had been made and were being carried into execution, and a resort to them would have occasioned delay and involved much expense. Under these circumstances, although they were the appropriate and, we may say, only legal tribunals to investigate and adjust claims that the heads of departments had felt it their duty to suspend or reject, it was fit, and commendable in the secretary, to appoint this board of commissioners to meet at once at a place where all the transactions had occurred out of which the claims and demands in dispute originated. It was impracticable for the secretary himself to hear and adjust them, even if the parties had desired it. The only immediate relief, therefore, within his power to provide, consistent with his duty under the circumstances, was to appoint persons to represent him.

We agree that this board possessed no authority, nor would the secretary, if he had appeared in person, have possessed any, to compel a hearing and adjustment of the claims, nor did they hold themselves out as possessing any such authority. The board were constituted for the simple purpose of affording to such claimants as might desire a tribunal to speedily hear and decide upon their claims, without the delay and expense of resorting to those which the law had recognized or provided. It was to relieve them from the hardship resulting from the suspension of the payment, as far as was in the power of the secretary; a suspension which he had felt compelled to order, under the circum-

stances, from a sense of duty to government. We cannot, therefore, appreciate the force of the argument that has been urged on behalf of these claimants, that the facility thus furnished by the board to hear and pass upon their claims, in some way operated compulsorily, to submit them for investigation; not legally, but morally; and that their necessities compelled them to seek this early opportunity to have them heard and adjusted. This, we think, a misapprehension. It was not so much the presence of this board that compelled the submission, if any compulsion existed, but the certainty, if the opportunity was not accepted, they would be obliged to encounter the delay and expense of an application to Congress or the Court of Claims. The constitution of the board presented simply a choice of tribunals to hear these claims. It was their preference for the tribunal sitting in their midst, and the high character of its members, that controlled the choice. This tribunal also afforded an additional advantage over the others, namely, that if after the hearing and adjustment of the claims the claimants were not satisfied, they were free to dissent, and look for redress to the only legal tribunals provided in such cases.

It has been strongly argued, that the receipt in full of all demands, which the board exacted from the claimant before the delivery of the voucher, or finding, was unauthorized; or, if authorized, that it is no bar to that portion of the original claim rejected by the board, as it is an instrument subject to explanation; that a receipt for payment in full, when only part of the debt is paid, is no defence to an action for the balance; and, further, that it was signed under protest. In the view we have taken of the case, the giving of this receipt is of no legal importance. The bar to any further legal demand against the government does not rest upon this acquittance, but upon the voluntary submission of the claims to the board; the hearing, and final decision thereon; the receipt of the vouchers containing the sum or amount found due to the claimant; and the acceptance of the payment of that amount, under the act of Congress providing therefor. From the time the secretary issued his

order, suspending the payment, and which we have held was well justified, under the circumstances, they must be regarded as claims disputed by the government; and unless this board had been constituted, could have been adjusted only by Congress or the Court of Claims. They fell within that mass of claims which the heads of the several departments had refused to adjust according to the views of the claimants, and this was the character that attached to them when presented before the board. We do not doubt but that there have been, and may be hereafter, cases where payments have been mistakenly or wrongfully withheld, and the claimant compelled either to give up his claim or seek redress before the appropriate tribunals, existing at the time, to hear and determine them. But this is no argument against the power or right of the heads of the departments to refuse the payment. What other remedy has the government to arrest the execution of fraudulent contracts, made by its subordinates, or the unfaithful execution of them? In such cases the courts are open to protect the rights of private individuals, but this remedy is unavailable to the government. The multitude of agents, official and otherwise, which it is obliged to employ in conducting its affairs, render this remedy utterly impracticable. Unless, therefore, some power exists in the government, summarily, to interfere, and arrest the frauds and irregularities committed against it, they must be allowed to go on to consummation. No one, we think, on reflection, will deny this power.

A good deal of the argument on the part of the claimant in support of the right to recover the contract price of these boats, is placed upon the ground of the absence of any authority in the board of commissioners to pass, *in invitum*, upon the claims. We have conceded this want of authority. They possessed no judicial power; nor did they claim to exercise any. The government having suspended all payment upon the contracts upon allegations of frauds and irregularities, until an inquiry could be had in respect to them, appointed this board as a favor to its creditors, to enable those who might desire it to have an immediate in-

vestigation. It was an act of kindness to them. They were left free, however, to present or withhold their claims. But we find nothing in the constitution of the board, or in its proceedings, or in the proceedings on the part of the government, indicating expressly, or by implication, that when the investigation was thus voluntarily submitted to, the amount adjusted, and the acceptance of payment by the claimant, the proceeding was not to be final. It could hardly have been supposed or believed by the claimants themselves, that the government would have gone to the expense of furnishing them a tribunal in their midst for this investigation, and subject itself also to the expense of carrying it on in the cases submitted to its cognizance as a matter of mere preliminary inquiry to adjust parts or portions of a contract, and make advances thereon, leaving the residue for further litigation before Congress, or the Court of Claims. This is not the course of litigation between private parties; they are not allowed to split up an entire contract or demand into several parts; and we are not aware of any reason for an exception to the rule in a proceeding against the government. We cannot think that a further hearing before any other tribunal of the same matters was within the contemplation of either party.

The hearing before this board was had more than a year before the present Court of Claims was established, under the act of Congress of March 3, 1863, which authorizes suits and judgments against the government. Previously, the only remedy of the creditor was by an application to Congress, or to the Court of Claims, which was established in 1855, but possessed no authority to render judgment against it. It was but a commission appointed by the government to hear and pass upon claims, but whose determination had no force till confirmed by Congress. It differed from the commission in the present case, as it was established by law, and had general authority to hear all claims; but, so far as respects the cases of voluntary submission before the board, we regard the finding, followed by acceptance of payment, as conclusive upon the claim as if it had been before this

first Court of Claims, and heard and decided there, and the amount found due paid by the government. Now, we suppose that it would be an error in the Court of Claims, as at present constituted, with power to render judgment against the government, to hear and revise the allowance of a claim already heard and decided upon by Congress, or by the former Court of Claims, and payment made, even if the claimant was not satisfied. And, we think, it is equally error, in the present case, upon the same principle and for the same reasons.

Indeed, unless the claimant is barred, under the circumstances stated, it would be difficult for the government to determine when there would be an end to claims put forth against it, as there is no statute of limitations, of which we are aware, applicable to them before this court.

The judgment of the court is, that the decree must be REVERSED, the cause remanded, with directions to enter a decree

DISMISSING THE PETITION.

UNITED STATES v. KIRBY.

1. The temporary detention of the mail, caused by the arrest of its carrier upon a bench warrant, issued by a State court, of competent jurisdiction, upon an indictment found therein for murder, is not an obstruction or retarding of the passage of the mail, or of its carrier, within the meaning of the ninth section of the act of Congress of March 3, 1825, which provides "that, if any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence pay a fine not exceeding one hundred dollars."
2. That section applies only to those who know that the acts performed by them, obstructing or retarding the passage of the mail, or of its carrier, will have that effect, and perform them with the intention that such shall be their operation.
3. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although to attain other ends may have been his primary object. The statute has

Statement of the case.

no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows.

4. Though all persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged; the rule is different when the process is issued upon a charge of felony. Every officer of the United States is responsible to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony, in the forms prescribed by the Constitution and laws.

5. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, and it will always be presumed that the legislature intended exceptions to its language, which would avoid results of this character.

THE defendants were indicted for knowingly and wilfully obstructing and retarding the passage of the mail and of a mail carrier, in the District Court for the District of Kentucky. The case was certified to the Circuit Court for that district.

The indictment was founded upon the ninth section of the act of Congress, of March 3, 1825, "to reduce into one the several acts establishing and regulating the post office department," which provides "that, if any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction, for every such offence, pay a fine not exceeding one hundred dollars; and if any ferryman shall, by wilful negligence, or refusal to transport the mail across the ferry, delay the same, he shall forfeit and pay, for every ten minutes that the same shall be so delayed, a sum not exceeding ten dollars."*

The indictment contained four counts, and charged the defendants with knowingly and wilfully obstructing the passage of the mail of the United States, in the district of Kentucky, on the first of February, 1867, contrary to the act of Congress; and with knowingly and wilfully obstructing and retarding at the same time in that district, the passage of one Farris, a carrier of the mail, while engaged in the performance of his duty; and with knowingly and wilfully re-

* 4 Stat. at Large, 104.

tarding at the same time in that district, the passage of the steamboat General Buell, which was then carrying the mail of the United States from the city of Louisville, in Kentucky, to the city of Cincinnati, in Ohio.

To this indictment the defendants, among other things, pleaded specially to the effect, that at the September Term, 1866, of the Circuit Court of Gallatin County, in the State of Kentucky, which was a court of competent jurisdiction, two indictments were found by the grand jury of the county against the said Farris for murder; that by order of the court bench warrants were issued upon these indictments, and placed in the hands of Kirby, one of the defendants, who was then sheriff of the county, commanding him to arrest the said Farris and bring him before the court to answer the indictments; that in obedience to these warrants he arrested Farris, and was accompanied by the other defendants as a posse, who were lawfully summoned to assist him in effecting the arrest; that they entered the steamboat Buell to make the arrest, and only used such force as was necessary to accomplish this end; and that they acted without any intent or purpose to obstruct or retard the mail, or the passage of the steamer. To this plea the district attorney of the United States demurred, and upon the argument of the demurrer two questions arose:

First. Whether the arrest of the mail-carrier upon the bench warrants from the Circuit Court of Kentucky was, under the circumstances, an obstruction of the mail within the meaning of the act of Congress.

Second. Whether the arrest was obstructing or retarding the passage of a carrier of the mail within the meaning of that act.

Upon these questions the judges were opposed in opinion, and the questions were sent to this court upon a certificate of division.

Mr. Ashton, Assistant Attorney-General, for the United States:

There are authorities which perhaps favor the position of the government, that the arrest of the carrier of the mail

under the warrant, was an obstruction of the mail and of the carrier thereof, within the intent and meaning of the act of Congress. *United States* v. *Barney*,* decided by Winchester, J., in Maryland district, in 1810, is in that direction. The indictment was under an act in the same words as the act of 1825. The detention was by an innkeeper, under a lien for the keeping of the horses employed in carrying the mail; and the court held that the defendant was not justified. The court says:

"The statute is a general prohibitory act. It has introduced no exceptions. The law does not allow any justification of a *wilful* and *voluntary* act of obstruction to the passage of the mail," etc.

So in *United States* v. *Harvey*,† where the indictment (which was under the act of 1825) was against a constable for arresting the mail-carrier under a warrant in an action of trespass, Taney, C. J., held that the mere *serving* of the warrant would not render the party liable; yet "if by serving the warrant he *detained* the carrier, he would then be liable."

Contrary, however, to these decisions, is the ruling of Mr. Justice Washington in *United States* v. *Hart*.‡ In that case it was held that the act of Congress was not to be construed so as to prevent the arrest of the driver of a carriage in which the mail is carried, when he is driving through a crowded city at an improper rate.

No opposing counsel.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

There can be but one answer, in our judgment, to the questions certified to us. The statute of Congress by its terms applies only to persons who "knowingly and wilfully" obstruct or retard the passage of the mail, or of its carrier; that is, to those who know that the acts performed will have

* 8 Hall's American Law Journal, 128. † 8 Law Reporter, 77.

‡ 1 Peters's Circuit Court, 390.

that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. Process of that kind can, therefore, furnish no justification for the arrest of a carrier of the mail. This is all that is decided by the case of the *United States* v. *Harvey*,* to which we are referred by the counsel of the government. The rule is different when the process is issued upon a charge of felony. No officer or employee of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed

* 8 Law Reporter, 77.

that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.*

The questions certified to us must be answered IN THE NEGATIVE; and it is SO ORDERED.

Mr. Justice MILLER, having been absent at the hearing, took no part in this order.

MULLIGAN v. CORBINS.

A statute of a State releasing "whatever interest" in certain real estate may "rightfully" belong to it, is not a law impairing the obligation of a contract in a case where an agent of the State, having by contract with it acquired an interest in *half* the lot, undertakes to sell and conveys the *whole* of it. In such case—and on an assumption that the agent does own one half—the statute will be held to apply to the remaining half alone.

ERROR to the Court of Appeals of Kentucky; the case being this:

Solomon Brindley, a free colored man, was the owner, in

* See also United States v. Hart, 1 Peters's Circuit Court, 390.

1808, of a small house and lot of trifling value, on Upper Street, in the city of Lexington, and was now dead. It did not appear when he died, or that he ever transferred the title to the property; but, at a very early day, William T. Barry occupied it, and this occupancy was continued after *his* death, by his legal representatives, until 1843, when it was sold, as Barry's property, on an execution in favor of the old Bank of Kentucky (then mainly owned by and under the control of the State), and purchased for Martha Ann Corbin, and Martha Ann Corbin, her daughter, two of the defendants in error, who occupied and claimed it until November, 1855.

At this date, T. B. Monroe, Jr., an attorney-at-law, was employed by the auditor of public accounts, in conformity with a statute of Kentucky,* by a written contract, to sue for and recover the property, as having escheated on the death of Brindley, it being agreed that Monroe was to have for his compensation a moiety of the property recovered. Monroe, in the execution of his employment, prosecuted a suit in the name of one Baxter, the agent appointed to take charge of escheated estates in Fayette County, where the property was situated, and procured a judgment of eviction, and afterwards undertook to sell the property to Mulligan, the plaintiff in error, and to deliver possession to him. The record did not show that Baxter was a party to this sale, or had sanctioned it. At this point of time the legislature stepped in, and on the 4th of April, 1861, passed a statute, enacting,

"That *whatever interest* in a small house and lot on Upper Street, in the city of Lexington, which was conveyed, in the year 1808, by Thomas Bodley to Solomon Brindley, may *rightfully belong to the State* by escheat, or otherwise, since the death of the said Brindley, without any known legal heirs, be, and the same is hereby, *released to, and vested in*, Martha Ann Corbin for her life, and her daughter, Martha Ann, absolutely after her said mother's death. The said property having been

* 1 Stanton's Statutes of Kentucky, chap. 34, p. 459.

bought, in the year 1843, as the property of William T. Barry, claiming and possessed of it, after said Brindley's death, and conveyed, in 1844, to the said mother and daughter, and who have occupied it as theirs ever since said sale and conveyance."

Mulligan, having filed a petition against the Corbins to recover possession of the property, insisted that this act of 1861 was inhibited by the Constitution of the United States, because it impaired the obligation of the contract which the auditor made with Monroe. The Court of Appeals directed the petition to be dismissed, and Mulligan brought the case by writ of error here.

Mr. Garrett Davis, for the plaintiff in error, made very numerous objections to the title of the Corbins, in addition to that of the unconstitutionality of the act of the 4th April, 1861.

Mr. Moore, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The only question that arises in this case, which it is competent for this court to decide, is, whether the act of the legislature of Kentucky, passed on the 4th day of April, 1861, is repugnant to the Constitution of the United States, because it impairs the obligation of a contract.

If the legislature had the power to release to the defendants in error the right of the State to the property in controversy, both common justice and the good name of the commonwealth demanded the exercise of that power, under the circumstances of this case. It appears that the affairs of the old Bank of Kentucky were substantially under the control of the State when the house and lot were seized as the property of Barry, and sold. The purchasers at that sale had a right to conclude that the State would never interfere to their prejudice, and no other party could, if Brindley died without heirs. The legislature, after the facts were known, would have been guilty of a great wrong, if they had refused to pass an act to give validity, as far as it

had power to do so, to a sale of which the State derived the benefit.

The general power of the legislature to grant to individuals the lands belonging to the State is not denied; but it is claimed there was a restraint in this instance, on account of the previous contract, concerning the property, between the auditor and Monroe.

It is charitable to suppose that the auditor would never have employed Monroe to dispossess the Corbins, had he known the manner in which they acquired possession, and that his proceedings were prompted by a commendable zeal for the true interests of the State.

But, after all, did the contract with Monroe have the effect claimed for it by the plaintiff in error? It certainly did not vest in him the title to the property. If, as is admitted, the auditor had the authority to contract with an attorney-at-law to give him one-half the escheated estate, as compensation for its recovery, still, this contract did not confer on him a license to sell the property after it was recovered, or to make any disposition of it that would bind the government.

The legislature had intrusted the management of escheated property with bonded officers, and confided to them the exclusive power of selling, under the written directions of the auditor.* In no other mode could the legal title of the State be divested, and it nowhere appears that Baxter, in whose name the suit against the Corbins was prosecuted, and who was the agent for escheated estates in Fayette County, where the property is situated, was a party to the sale to Mulligan, or that he ever sanctioned it. Viewing the transaction in the aspect most favorable to Mulligan, it is apparent that his rights, under this contract, are those which belonged to Monroe, and that he has no other or better rights than Monroe had. The case, then, resolves into this question: what were the rights of Monroe, and how are they affected by the act of the legislature? The answer to this question is very plain, and relieves the proceeding of any difficulty.

* 1 Stanton's Statutes of Kentucky, chap. 34, p. 459.

Syllabus.

When the escheat was perfected, the legal title to the entire property was vested in the State; but as the State, through its auditor, had bargained with Monroe to concede a moiety to him for his services, it follows that the State was under obligations to convey, in some proper form, this moiety to him. This left the State the undisputed owner of one-half the property, with such power of disposition as the legislature, in its wisdom, should see proper to give it. The act in question does not attempt to interfere with any privilege which belonged to Monroe, and we have no right to presume it was passed with any such intention. It does not profess to grant to the Corbins any particular estate, but simply releases to them whatever interest the State had to the property they occupied, and as the State undoubtedly had an interest in it to the extent of one moiety, how can it be said that the obligation of the contract between the auditor and Monroe was impaired by this statute?

The statute operated rightfully on the moiety owned by the State, and there is no authority for saying the legislature meant to do anything more.

It is not our province to decide any other point in this case, and as the act of the legislature of Kentucky does not, either in terms or by necessary implication, impair the obligation of the auditor's contract with Monroe, it follows that the judgment of the Court of Appeals must be

AFFIRMED.

UNITED STATES v. GILMORE ET AL.

1. Before a depositary of public money can, in a suit against him by the United States for a balance, offer proof of credits for clerk hire, he must show by evidence from the books of the treasury — a transcript of the proceedings of the officers being a proper form of such evidence — that a claim for such credits had been presented to the proper officers of the treasury (that is to say, to the first auditor, and afterwards to the first comptroller for his final decision), and by them had been, in whole or in part, disallowed.
2. If proof of such credits have been permitted to go to the jury without

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such proper foundation for it having been first laid, it must be afterwards excluded, and all consideration of the claims withdrawn from their consideration. To allow them to remain, even with instructions whose purpose was to control and cure its effect, or with any instructions short of withdrawal, is error.

8. Whether testimony in support of such claims was properly in the case, was a question for the court and not for the jury.

ERROR to the Circuit Court for Nebraska; the case having been submitted *by Mr. Ashton, Assistant Attorney-General, for the United States.*

No argument on the other side.

Mr. Justice SWAYNE stated the case and delivered the opinion of the court.

This is an action of debt upon the bond of Gilmore, one of the defendants in error, as receiver of public moneys "for the district of lands subject to sale in the Territory of Nebraska," and also as a depositary of public moneys.

Upon the trial the defendants claimed a credit for the hire of certain clerks employed by Gilmore as such depositary, and offered proof in support of the demand. The attorney of the United States objected to the admission of the evidence upon several grounds. One of them was, that it must first be shown that the claim had been exhibited to the proper accounting officer of the treasury and disallowed, and that the exhibition and disallowance could be proved only by the certificate of such officer. "Whereupon the court stated it would permit the evidence, and control the matter by instructions to the jury. Objections overruled, and ruling excepted to by plaintiffs."

The same things occurred with reference to a claim for office rent, set up by Gilmore as such depositary.

Gilmore subsequently testified as follows:

"I presented these claims to the accounting officer, and they were disallowed."

To what officer they were presented is not disclosed. This is all the testimony the bill of exceptions contains upon the subject.

The statutory provisions prescribing what shall be done by the debtor in such cases are found in the 4th section of the act of March 3d, 1797.* That section, so far as it is material to be considered in the case before us, is as follows:

"In suits between the United States and individuals, no claim for a credit shall be admitted upon the trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed in whole or in part."

Those officers were then the auditor and comptroller. There was but one of each at that time.† It was made the duty of the auditor "to receive all public accounts, and after examination to transmit the accounts, with the vouchers and certificate, to the comptroller for his decision thereon."

The act of the 25th of April, 1812,‡ created the General Land Office, and transferred to the commissioner the duties of the auditor in respect to all accounts relating to the public lands. The act of March 3d, 1817,§ created four additional auditors and one additional comptroller. It gave the charge of all accounts accruing in the Treasury Department to the first auditor, and made it his duty to report them to the first comptroller. The language employed is the same as that used in the act of 1797. This did not affect the duties of the Commissioner of the General Land Office as to all accounts relating to the public lands, which the act of 1812 had devolved upon him.

Receivers and depositaries are required to keep accounts of their contingent expenses. Those accounts are separate and distinct from those of their receipts and disbursements of the public moneys. Where the offices of receiver and depositary are united in the same person, the expense accounts of the two offices are nevertheless required to be kept separately from each other.

The claims in question in the case before us grew out of

* 1 Stat. at Large, 515.
† Act of September 2, 1789, Id. 66.
‡ 2 Stat. at Large, 716.
§ 3 Id. 366.

that branch of Gilmore's duties which related to his office of depositary, and had no connection with his office of receiver. They should, therefore, have been presented to the first auditor for examination, and afterwards to the first comptroller for his final decision. If disallowed, the disallowances would have appeared in the "statement of the differences of account" transmitted by the auditor to the comptroller with the accounts, vouchers, and certificate, as required by the statute. If the comptroller had confirmed the decision of the auditor, a transcript of the proceedings of those officers would have been the proper evidence for the defendants to produce.

If the claims were not presented until after the account was closed upon the books of the treasury, still it was necessary to submit them for examination to both those officers. The action of both was necessary. A transcript showing that action would have been sufficient. Parol evidence in such cases is wholly inadmissible. Evidence from the books of the treasury in some form is indispensable.

These remarks have no application to those provisions of the section under consideration which have not been referred to.

The court should not have permitted any proof of the claims to be given until the proper foundation for it had been laid. When the defendants failed to produce the evidence necessary to warrant the introduction of such testimony, all which had been given should have been excluded, and the claims withdrawn from the consideration of the jury. To allow them to remain in the case was an error, and any instruction given afterwards, short of their withdrawal, was unavailing to cure it. The course proposed to be pursued when the objection by the district attorney was taken, could hardly fail, under any circumstances, to mislead and confuse, and to prevent the proper trial of the cause. The object of pleading is to concentrate the controversy upon the questions of fact and of law, which should control the result. The value of the system in the administration of justice can hardly be too highly estimated. The

exclusion from the testimony of everything irrelevant and incompetent is not less important.

Was the error committed by the admission of the testimony objected to subsequently remedied?

Nothing further upon the subject appears in the record but the following passages at the close of the bill of exceptions:

"The plaintiff requested the court to charge the jury as follows:

"1st. That in this action no claim for credit can be admitted as a defence, unless it is first shown to the jury that such claim was presented to the proper officer of the government for examination, and by such officer disallowed in whole or in part; or that the defendant, Gilmore, first shows that he was prevented from exhibiting such claim or account of expenses at the treasury by absence from the United States, or some unavoidable accident."

Another instruction, not material to be stated, was also asked. The bill then proceeds:

"Which said two points were not given by the court in the form requested, but were substantially given in the oral charge of the court to the jury. The first point and the second were given with a modification, to which the plaintiffs then and there excepted."

What the modification of the first instruction was to which this exception relates is not shown. We cannot, therefore, consider it.

Whether the testimony in support of the claim was properly in the case was a question for the court, and not for the jury. Yet it was left to the latter for them to determine. It is clear that the incompetent testimony which had been admitted was not withdrawn from their consideration.

The judgment is, therefore, REVERSED, and the cause will be remanded to the Circuit Court with instructions to issue a

VENIRE DE NOVO.

KELLY v. OWEN ET AL.

1. The act of Congress of February 10th, 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen," confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide.
2. The terms "married," or "who shall be married," in the act, do not refer to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers citizenship upon her.
3. The object of the act was to allow the citizenship of the wife to follow that of her husband, without the necessity of any application for naturalization on her part.
4. The terms, "who might lawfully be naturalized under the existing laws," only limit the application of the law to free white women.

APPEAL from the Supreme Court of the District of Columbia.

The case was this:

In 1848, one Miles Kelly, a native of Ireland, emigrated to the United States, and settled in the District of Columbia. In January, 1853, he married Ellen Duffy, and in May, 1855, was naturalized. He subsequently acquired several lots in the city of Washington, and died in March, 1862, seized and possessed of them, intestate and without issue; but leaving to survive him, in the United States, the said Ellen, his widow, and two sisters, Ellen Owen and Margaret Kahoe. His widow claimed the residue of his estate, after the payment of debts, to the exclusion of his sisters, Mrs. Owen and Mrs. Kahoe. These set up that they were entitled to a share of the estate, as the heirs-at-law of the deceased, and brought the present suit on the equity side of the Supreme Court of the District, for the sale or partition of the estate. The court decided in favor of the widow, and by its decree gave her the entire estate.

From this decree the sisters appealed to the Supreme Court in banc, and by this latter court the decree was reversed. The widow then appealed to this court.

On the 10th of February, 1855, Congress passed an act,* entitled "An act to secure the right of citizenship to children of citizens of the United States, born out of the limits thereof," the second section of which provides, "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."

All the parties, the widow and the two sisters, were aliens by birth, but they asserted that they became citizens by their respective marriages. Whether this was so or not, depended upon the construction given to the section of the act of 1855, above quoted.

Ellen, the widow, arrived in the United States in 1837, between the age of fourteen and fifteen, and had remained in the country ever since.

The sister, Ellen Owen, arrived in 1856, and was married to Edward Owen in 1861. He was naturalized in 1835. The sister, Margaret Kahoe, arrived in the United States in 1850, and was married to James Kahoe in 1852. He was naturalized in 1854.

The case was submitted by *Messrs. Phillips and R. J. Brent, for the appellant*, and by *Mr. W. J. Miller, contra.*

Mr. Justice FIELD delivered the opinion of the court.

This is a suit in equity, for the sale or partition of certain real estate, situated within the District of Columbia, of which Miles Kelly was seized at the time of his death, in March, 1862. The deceased died intestate, and without issue, leaving surviving him, in the United States, a widow, Ellen, and two sisters, Ellen Owen and Margaret Kahoe. The widow claimed the entire estate, after the payment of the

* 10 Stat. at Large, 604.

debts of the deceased, to the exclusion of the sisters, who claimed that they were entitled, as his heirs-at-law, to a share of the same. The court rendered a decree in favor of the widow, and the sisters appealed to the Supreme Court of the District, where the decree was reversed, the latter court holding that the sisters were entitled to a share of the estate.

The case turns upon the construction given to the second section of the act of Congress of February 10th, 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."*

As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms "married," or "who shall be married," do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her. The construction which would restrict the act to women whose husbands, at the time of marriage, are citizens, would exclude far the greater number, for whose benefit, as we think, the act was intended. Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part; and, if this was the object, there is no reason for the restriction suggested.

The terms, "who might lawfully be naturalized under the existing laws," only limit the application of the law to free white women. The previous naturalization act, exist-

* 10 Stat. at Large, 604.

Statement of the case.

ing at the time, only required that the person applying for its benefits should be "a free white person," and not an alien enemy.*

A similar construction was given to the act by the Court of Appeals of New York, in *Burton* v. *Burton*,† and is the one which gives the widest extension to its provisions.

It follows, from these views, that the widow and the two sisters were citizens of the United States upon the decease of the intestate husband. The widow and Margaret Kahoe became such on the naturalization of their respective husbands, and Ellen Owen became such on her marriage. The sisters are therefore entitled to share with the widow in the estate of the deceased, and the decree of the Supreme Court of the District must be

AFFIRMED.

EWING v. HOWARD.

1. Usury being a defence that must be strictly proved, a court will not presume that a note dated on one day for a sum payable with interest from a day previous was for money first lent on the day of the date only.
2. Where a defendant on suit upon such a note wishes to rely at any time on usury as a defence, he should raise the question in some form in the court below. If this is not done the defence cannot be made here.

ERROR to the Circuit Court for the Middle District of Tennessee.

A statute of Tennessee, passed in 1860,‡ and which by its terms was to take effect from the 1st of September of that year, allowed 10 per cent. interest (instead of 6 per cent., a former rate) to be taken for money lent, provided that such agreement were expressed "on the face of the contract," whether evidenced by bond, bill, note, or other written instrument. The same statute, however, provided, that if any greater amount of interest than 10 per cent. was paid,

* Act of April 14th, 1802, 2 Stat. at Large, 153. † 38 New York, 378.
‡ Sessions Act, chap. 41, § 1, p. 81.

or agreed to be paid, the whole amount of the interest should be forfeited by the payee. And it made the lending of money at such greater rate a misdemeanor, subject to indictment, and punishable accordingly.

The act was repealed on the 31st of January, 1861. With the exception, therefore, of the five months from the 1st of September, 1860, to 31st January, 1861, it had always been in Tennessee a misdemeanor to lend money at a greater rate of interest than 6 per cent. per annum.

In this state of the law there, Howard sued Ewing, in 1865, in the court below, upon two notes: one (the only one which was the subject of controversy here) having been *dated November 15th*, 1860, and by which he, Ewing, agreed to pay him, Howard, or order, $\$3333\frac{33}{100}$, "with interest at the rate of 10 per cent. per annum, *from and after the 1st day of September last past* till paid." By a memorandum in writing, *dated on the same day as the note*, payment was guaranteed by the father of Ewing; the guaranty speaking of the note as being for money "*heretofore*" lent by Howard to Ewing's son.

The declaration was in the ordinary form of a declaration in assumpsit. Plea the general issue, and nothing else. On the trial the notes were put in evidence without objection, and there being no other evidence in the case, verdict was given for the plaintiff. There was no request for instructions on either side.

From an entry in the record, that "the motions for a new trial and in arrest of judgment were by this court *overruled*," it was to be inferred that motions, both for a new trial and in arrest of judgment, had been made below; but neither were set forth in the record as sent here, and, accordingly, if usury or any other defence had been made in fact, in the court below, to the notes, no evidence of it appeared here.

Judgment having been given for the plaintiff, the defendant now brought the case here.

Messrs. Waterson and Crawford, for the plaintiff in error:

The note is void, being an illegal contract for usury, ap-

parent upon its face. It expresses that it is made for value received on the day of its date, and yet calls for interest from a period two months and a half before that day, viz., from the day when the 10 per cent. law took effect; making the rate of interest in effect more than thirteen per cent. per annum. "Every contract which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender. The penalty implies a prohibition."*

Moreover, the illegality being apparent on *the face of the instrument which is the subject of the suit*, it is radical and pervading, attaching to the case wherever it may be. The leading Tennessee case of *Isler* v. *Brunson*† is decisive.

Mr. Caruthers, contra:

The question is, whether the note of November 15th, 1860, is illegal on its face? If not, it is not obnoxious to the objection made.

It is a well-settled rule, that the courts will avoid, if practicable by any fair intendment, that construction of a transaction which will subject a party to a contract to a penalty. If this note was for money lent on or before the 1st of September, 1860, it is legal. Now, the written guaranty of Ewing, the father, shows that it was for a previous loan. But independently of that the presumption would be that the loan was made at or before the time from which the interest was to begin to run.

But even if this were not so, yet on this writ of error the court below cannot be put in the wrong, by the making of an objection here that was not made there. If the defendants desired to make such a defence as that now set up, it should have been done then, and the judgment of the court taken upon it. That would have made a question for this court of errors to sustain or correct. This is a court to correct erroneous decisions made by the court below, on points of defence presented, and not for the origination of new

* 1 Smith's Leading Cases, page 622, 6th ed. † 6 Humphreys, 277.

defences, which the inferior court was not called upon to adjudicate.

Reply: The case of *Isler* v. *Brunson*, already cited, answers the objection that the objection is first made here, and seems to be decisive of the case presented by this record:

"If a party plaintiff bring into a court, either of law or equity, an illegal contract that it may be enforced, and this illegality is shown and set forth *by himself*, and not disclosed by plea or allegation from the defendant, it is the duty of *either court*, on ground of public policy, to repel the plaintiff *and refuse its action on his behalf.* Thus, if in a declaration on a security for money profert be made of the security, and upon its face it appears to have stipulated for more than legal interest, no judgment can be rendered for the plaintiff notwithstanding the act of 1835 only avoids the usurious excess."

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgment in this case was for the plaintiff in the court below, and the defendants in that court sued out a writ of error and removed the cause into this court. The action was assumpsit, and the cause of action was the two promissory notes set forth in the bill of exceptions. Plea was the general issue, and the bill of exceptions shows that the plaintiff, to maintain the issue on his part, introduced in evidence the two promissory notes on which the suit was founded. They were introduced without objection, and the bill of exceptions states to the effect that there was no other evidence introduced by either party. Defendants moved for a new trial, and also in arrest of judgment, but the court overruled both motions, and the defendants excepted to the rulings of the court.

Settled rule of the court is that a motion for a new trial is addressed to the discretion of the court, and that the ruling of the court in granting or denying such a motion is not the proper subject of exceptions.*

Motions in arrest of judgment present questions of law

* Henderson v. Moore, 5 Cran. 11; Blunt v. Smith, 7 Wheaton, 248.

when they are so framed as to call in question the sufficiency of an indictment or of a declaration in a civil suit; but the transcript does not contain the motion, and the declaration appears to be in due form and sufficient to sustain the judgment.

Defects of form in the writ or declaration, not pointed out by demurrer, are not in general regarded in this court as good cause for reversing a judgment brought here by writ of error, as the Federal courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe.*

Neither of the objections taken to the action of the Circuit Court and embodied in the bill of exceptions are urged in this court, and being in themselves entirely untenable, they must be considered as having been abandoned. Nothing else remains to be considered in the case except what arises from the form and tenor of the notes, which are set forth at large in the bill of exceptions, but without any comment or any objection being made to the right of the plaintiff to recover.

Examined throughout, the transcript shows no objection to the right of the plaintiff to recover on the second note in the case, and as it is not suggested by the defendants that there is any defence to that note, further comment in that behalf is unnecessary. Attention of this court is invited only to the other note, and the argument is that it is illegal and void, because it secures by its very terms usurious interest. Legal interest in that State is six per cent. per annum, unless otherwise agreed between the parties, but contracts between the borrower and the lender of money may be made for a higher rate not exceeding ten per cent. per annum, as in this case, provided the agreement to that effect is expressed "in the face of the contract," whether evidenced by bond, bill, note, or other written instrument.†

* 1 Stat. at Large, 91; Stockton v. Bishop, 4 Howard, 155; Railroad v. Lindsay, 4 Wallace, 650.

† Sess. Act, chap. 41, § 1, p. 81.

Opinion of the court.

Debts created for the loan of money under an agreement to pay ten per cent., expressed as required in the statute, may be subsequently renewed for the same rate of interest, but the provision is that if any greater amount of interest than ten per cent. per annum is paid or agreed to be paid for the use of money, "the whole amount of interest so paid, or agreed to be paid, shall be forfeited by the payee." Provision is also made by the sixth section of the act, that any person or persons who shall violate the provisions of that law shall be subject to indictment, as in other cases of misdemeanor, and be punished as therein provided.*

Principal reason now urged for the reversal of the judgment is, that the first note described in the bill of exceptions is illegal, because the makers of the same promised to pay interest on the principal at the rate of ten per cent. per annum, commencing the computation two months and a half before the date of the note. Date of the note is November 15, 1860, and the agreement, as expressed in the note, is to pay interest at the rate of ten per cent. per annum from and after the first day of September last until paid.

Argument for the defendants is that the contract is usurious, and that, inasmuch as the loaning of money at a greater rate of interest is prohibited by law, and the violation of the provision is declared to be a misdemeanor, the contract expressed in the note is illegal, and that the judgment should have been for the defendants.

Suppose it be admitted that the presumption is as contended by the defendant, that the note was given for the loan of money, and that the contract is illegal, still the presumption is not a conclusive one, as the note may have been given for the purchase of goods, chattels, or lands, and the bargain may have been made and the property actually transferred on the exact day specified in the note, as the time from which interest is to be computed.

Promissory notes, if given under those circumstances, though bearing interest anterior to their date, are neither

* Sess. Act, p. 83, Code, 863.

usurious nor illegal, unless the day described in the contract from which to compute the interest is anterior to the actual date of the transaction and the transfer of the subject-matter of the purchase and sale, and it is quite clear that promissory notes in such a case, as between the original parties, are open to explanation.

Where the defendant intends to make such a defence he should plead it in the court of original jurisdiction, or raise the question in some form and present it for the decision of the court. Doubtless he may raise the question by plea, by objection to the introduction of the note in evidence, or by a prayer for instruction to the jury, but he cannot remain silent in the subordinate court and then present the objection for the first time in the court of errors, when it is too late for the plaintiff to offer any explanations, or to show what was the real nature and character of the transaction.

Nothing of the kind was done or suggested in this case by the defendants, but they pleaded the general issue, giving no notice of any such defence, and the note was introduced at the trial without objection, and there is nothing in the record to show, or tending to show, that the circuit judge ever made or was requested to make any ruling upon the subject.

Parties relying upon such an objection should raise it at the trial before the jury, when the other party would have an opportunity to offer any explanations in his power to show that the contract was legal and valid.

Bills or notes promising the payment of interest from a time anterior to their date, if the bills or notes so written are to be considered as conclusive evidence that they were given for money lent on the day of their date, would properly be regarded as usurious, but it is well known that bills and notes are often given subsequent to the transaction which constitutes their consideration and for property sold, and upon other transactions as well as for money lent. "Usury is a defence that must be strictly proved, and the court will not presume a state of facts to sustain that defence where the instrument is consistent with correct dealing."*

* Marvin v. Feeter, 8 Wendell, 533; Holden v. Pollard, 4 Pickering, 178.

Syllabus.

Universal rule is that where an instrument will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred.*

Theory of the defendants is that the note is usurious and illegal on its face, but the authorities are clearly the other way, that the presumption is that the note was given upon a state of facts which authorized the taking of the instrument, and that the contract was lawful and valid.†

Tested as matter of principle, or by the decided cases, the better opinion is that the presumption is that such a contract is valid and not usurious, and that the burden to prove the contrary is upon the party who makes the charge.

JUDGMENT AFFIRMED.

EX PARTE McCARDLE.

1. The appellate jurisdiction of this court is conferred by the Constitution, and not derived from acts of Congress; but is conferred "with such exceptions, and under such regulations, as Congress may make;" and, therefore, acts of Congress affirming such jurisdiction, have always been construed as excepting from it all cases not expressly described and provided for.
2. When, therefore, Congress enacts that this court shall have appellate jurisdiction over final decisions of the Circuit Courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also.
3. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.
4. The act of 27th of March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the Judicial Act of 1789, which authorized appeals to this court from the decisions of the Circuit Courts, in cases of *habeas corpus*, does not except from the appellate jurisdiction of this

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* Archibald *v.* Thomas, 3 Cowen, 290.

† Andrews et al. *v.* Hart et al., 17 Wisconsin, 307; Leavitt *v.* Pell, 27 Barbour, 332; Levy *v.* Hampton, 1 McCord, 147.

court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of *habeas corpus*.

APPEAL from the Circuit Court for the Southern District of Mississippi.

The case was this:

The Constitution of the United States ordains as follows:

"§ 1. The judicial power of the United States shall be vested *in one Supreme Court*, and in such inferior courts as the Congress may from time to time ordain and establish."

"§ 2. The judicial power shall extend to all cases in law or equity arising *under this Constitution, the laws of the United States*," &c.

And in these last cases the Constitution ordains that,

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations, as the Congress shall make.*"

With these constitutional provisions in existence, Congress, on the 5th February, 1867, by "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and *from the judgment of the said Circuit Court to the Supreme Court of the United States.*

This statute being in force, one McCardle, alleging unlawful restraint by military force, preferred a petition in the court below, for the writ of *habeas corpus*.

Statement of the case.

The writ was issued, and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libellous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

Upon the hearing, the petitioner was remanded to the military custody; but, upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal-bond, for costs, he was admitted to bail upon recognizance, with sureties, conditioned for his future appearance in the Circuit Court, to abide by and perform the final judgment of this court. The appeal was taken under the above-mentioned act of February 5, 1867.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied.*

Subsequently, on the 2d, 3d, 4th, and 9th March, the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress,† returned with objections by the President, and, on the 27th March, repassed by the constitutional majority, the second section of which was as follows:

"*And be it further enacted*, That so much of the act approved February 5, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed."

* See Ex parte McCardle, 6 Wallace, 318.

† Act of March 27, 1868, 15 Stat. at Large, 44.

Argument against the operation of the act.

The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here, by his duties in the Court of Impeachment, the cause was continued under advisement. Argument was now heard upon the effect of the repealing act.

Mr. Sharkey, for the appellant:

The prisoner alleged an illegal imprisonment. The imprisonment was justified under certain acts of Congress. The question then presents a case arising under "the laws of the United States;" and by the very words of the Constitution the judicial power of the United States extends to it. By words of the Constitution, equally plain, that judicial power is vested in one Supreme Court. This court, then, has its jurisdiction directly from the Constitution, not from Congress. The jurisdiction being vested by the Constitution alone, Congress cannot abridge or take it away. The argument which would look to Congressional legislation as a necessity to enable this court to exercise "the judicial power" (any and every judicial power) "of the United States," renders a power, expressly given by the Constitution, liable to be made of no effect by the inaction of Congress. Suppose that Congress never made any exceptions or any regulations in the matter. What, under a supposition that Congress must define when, and where, and how, the Supreme Court shall exercise it, becomes of this "judicial power of the United States," so expressly, by the Constitution, given to this court? It would cease to exist. But this court is coexistent and co-ordinate with Congress, and must be able to exercise the whole judicial power of the United States, though Congress passed no act on the subject. The Judiciary Act of 1789 has been frequently changed. Suppose it were repealed. Would the court lose, wholly or at all, the power to pass on every case to which the judicial power of the United States extended? This act of March 27th, 1868, does take away the whole appellate power of

this court in cases of *habeas corpus*. Can such results be produced? We submit that they cannot, and this court, then, we further submit, may still go on and pronounce judgment on the merits, as it would have done, had not the act of 27th March been passed.

But however these general positions may be, the case may be rested on more special grounds. This case had been argued in this court, fully. Passing then from the domain of the bar, it was delivered into the sacred hands of the judges; and was in the custody of the court. For aught that was known by Congress, it was passed upon and decided by them. Then comes, on the 27th of March, this act of Congress. Its language is general, but, as was universally known, its purpose was specific. If Congress had specifically enacted 'that the Supreme Court of the United States shall never publicly give judgment in the case of McCardle, already argued, and on which we anticipate that it will soon deliver judgment, contrary to the views of the majority in Congress, of what it ought to decide,' its purpose to interfere specifically with and prevent the judgment in this very case would not have been more real or, as a fact, more universally known.

Now, can Congress thus interfere with cases on which this high tribunal has passed, or is passing, judgment? Is not legislation like this an exercise by the Congress of judicial power? *Lanier* v. *Gallatas** is much in point. There a motion was made to dismiss an appeal, because by law the return day was the 4th Monday in February, while in the case before the court the transcript had been filed before that time. On the 15th of March, and *while the case was under advisement*, the legislature passed an act making the 20th of March a return day for the case; and a motion was now made to reinstate the case and hear it. The court say:

"The case had been submitted to us before the passage of that act, and was beyond the legislative control. Our respect for the

* 13 Louisiana Annual, 175.

Argument for the operation of the act.

General Assembly and Executive forbids the inference that they intended to instruct this court what to do or not to do whilst passing on the legal rights of parties in a special case already under advisement. The utmost that we can suppose is," &c.

In *De Chastellux* v. *Fairchild*,* the legislature of Pennsylvania directed that a new trial should be granted in a case already decided. Gibson, C. J., in behalf of the court, resented the interference strongly. He said:

"It has become the duty of the court to temporize no longer. The power to order new trials is judicial. But the power of the legislature is not judicial."

In *The State* v. *Fleming*,† where the legislature of Tennessee directed two persons under indictment to be discharged, the Supreme Court of the State, declaring that "the legislature has no power to interfere with the administration of justice in the courts," treated the direction as void. In *Lewis* v. *Webb*,‡ the Supreme Court of Maine declare that the legislature cannot dispense with any general law in favor of a particular case.

Messrs. L. Trumbull and M. H. Carpenter, contra:

1. The Constitution gives to this court appellate jurisdiction in any case like the present one was, only with such exceptions and under such regulations as Congress makes.

2. It is clear, then, that this court had no jurisdiction of this proceeding—*an appeal from the Circuit Court*—except under the act of February 5th, 1867; and so this court held on the motion to dismiss made by us at the last term.§

3. The act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. No court can do any act in any case, without jurisdiction of the subject-matter. It can make no difference at what point, in the progress of a cause, the

* 15 Pennsylvania State, 18.
† 7 Humphreys, 152.
‡ 8 Greenleaf, 326.
§ 6 Wallace, 318.

jurisdiction ceases. After it has ceased, no judicial act can be performed. In *Insurance Company* v. *Ritchie*,* the Chief Justice, delivering the opinion of the court, says:

"It is clear, that when the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction."

And in that case the repealing statute, which was passed during the pendency of the cause, was held to deprive the court of all further jurisdiction. The causes which were pending in this court against States, were all dismissed by the amendment of the Constitution denying the jurisdiction; and no further proceedings were had in those causes.† In *Norris* v. *Crocker*,‡ this court affirmed and acted upon the same principle; and the exhaustive argument of the present Chief Justice, then at the bar, reported in that case, and the numerous authorities there cited, render any further argument or citation of cases unnecessary.§

4. The assumption that the act of March, 1868, was aimed specially at this case, is gratuitous and unwarrantable. Certainly the language of the act embraces all cases in all time; and its effect is just as broad as its language.

The question of merits cannot now, therefore, be passed upon. The case must fall.

The CHIEF JUSTICE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, con-

* 5 Wallace, 544. † Hollingsworth v. Virginia, 3 Dallas, 378.

‡ 18 Howard, 429.

§ Rex v. Justices of London, 3 Burrow, 1456; Yeaton v. United States, 5 Cranch, 281; Schooner Rachel v. United States, 6 Id. 329; United States v. Preston, 3 Peters, 57; Com. v. Marshall, 11 Pickering, 350.

ferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau* v. *The United States*,* particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other

* 6 Cranch, 312; Wiscart v. Dauchy, 3 Dallas, 321.

appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.*

On the other hand, the general rule, supported by the best elementary writers,† is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris* v. *Crocker*,‡ and more recently in *Insurance Company* v. *Ritchie*.§ In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

* Lanier v. Gallatas, 13 Louisiana Annual, 175; De Chastellux v. Fairchild, 15 Pennsylvania State, 18; The State v. Fleming, 7 Humphreys, 152; Lewis v. Webb, 3 Greenleaf, 326.

† Dwarris on Statutes, 538. ‡ 13 Howard, 429. § 5 Wallace, 541.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.*

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

MOORE *v.* MARSH.

Under the fourteenth section of the Patent Act of 1836, enacting that damages may be recovered by action on the case, to be brought in the name of the person "interested," the original owner of the patent, who has afterwards sold his right, may recover for an infringement committed during the time that he was owner. The word "interested," means interested in the patent at the time when the infringement was committed.

ERROR to the Circuit Court for the Western District of Pennsylvania.

The eleventh section of the Patent Act of 1836, relating to the assignment of patents, thus enacts:

"Every patent shall be assignable in law either as to the whole interest, or any undivided part thereof, by any instrument in writing, which assignment, and also every grant and conveyance of the exclusive right under any patent to make

* Ex parte McCardle, 6 Wallace, 324.

and use, and to grant to others to make and use the thing patented, within and throughout any specified part or portion of the United States, shall be recorded," &c., &c.

And the fourteenth section, which relates to damages in suits, brought by the owners of patents, for infringement, says:

"And such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought *in the name or names of the person or persons interested*, whether as patentees, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States."

This statute being in force, Moore, a patentee, brought suit in the court below, against Marsh, for infringement. Marsh pleaded that *after* the date of the alleged infringement, he Moore, the patentee, had sold and assigned an undivided half of the patent for the district where the infringement was alleged to have been committed. To this plea, Moore demurred. The court having sustained the demurrer, and judgment being given accordingly, the case was brought here by the patentee on appeal.

The general question therefore, was, whether a sale and assignment by a patentee of his patent right is, under the fourteenth section above quoted, a bar to an action by him to recover damages for an infringement committed *before* such sale and transfer? In other words, whether the words of the statute "name of the person interested," meant, as the plea assumed, "persons interested in the patent at the time when the suit was brought;" or meant, as the declaration assumed, interested at the time when the cause of action accrued.

The case was submitted on briefs.

Mr. S. S. Fisher, for the patentee, appellant, argued, that the latter, or interested in the *damages*, was the plain meaning; that it would be unreasonable and contrary to all analogies of the law, that a simple assignment of a patent-right should carry with it the right to all previous damages, carry with it

all the damages which had ever accrued to its former owners in the whole course of the patent's life, and from the date of the letters patent; that back damages were not a matter inherent in, sticking to, and inseparable from the patent, but were a matter which belonged to the owner in his individual right. And this natural view, he considered, was supported by the authority of this court in *Dean* v. *Mason*.*

Messrs. Henry Baldwin, Jr., and W. Bakewell, contra, argued, that the words of the fourteenth section of the statute, meant interested *in the patent*, and not interested *in the damages;* and that this was manifest—

1. By comparing this fourteenth section with the eleventh section above cited.

2. By the fact that *licensees* were excluded, though they were frequently the only parties interested in the damages, while the plaintiff in such cases is the party interested as patentee, assignee, or grantee of an exclusive right, and had no interest in the damages.

3. From the decisions (as the learned counsel interpreted them) of this court and of several of the circuit courts.†

An opposite view, they contended, might lead to gross oppression. According to such view, a party who, in *mistake* as to his rights—and in these nice questions of mechanical principle, innocent mistake might well occur—may have infringed a patent during a number of years, is exposed at the end of the term to as many separate suits for infringement as there have been separate owners of the patent during the time he has been using it; and may have to defend against fifty separate actions brought by as many different plaintiffs for what has been a continuous act of user of the patented machine. Such a hardship could never be intended by Congress, and this court would not put a construction on the act fraught with such oppressive consequences. This argument,

* 20 Howard, 198.

† Gayler *v.* Wilder, 10 Howard, 498; Washburn *v.* Gould, 3 Story, 131, 167; Suydam *v.* Day, 2 Blatchford, 23; Goodyear *v.* McBurney, 3 Id. 32; Blanchard *v.* Eldridge, 1 Wallace, Jr., 340.

ab inconvenienti, was considered a sound one in this court (the counsel argued), in *Gayler* v. *Wilder*,* where Taney, C. J., pressed it in behalf of the court, and by Mr. Justice Grier, in *Blanchard* v. *Eldridge*,† where speaking of the eleventh section of the act, he says that "the act of Congress has not subjected *even a pirate* of the machine to fifty different suits by fifty several assignees, whose several interests might be affected."

Dean v. *Mason*, relied on by Mr. Fisher (the counsel argued), did not apply. It was an assignment *pendente lite*, and moreover of a mere license.

Mr. Justice CLIFFORD delivered the opinion of the court.

Viewed in the light of the admitted facts, the only question in the case is whether the assignment by the plaintiff to a third person of an undivided half of the right, title, and interest secured to him by his letters patent, subsequent to the alleged infringement, but before the commencement of his suit, is a bar to his claim to recover damages for such infringement.

Letters patent were granted to the plaintiff on the 18th of April, 1848, for a certain new and useful improvement in grain drills, in which it is alleged that he is the original and first inventor of the improvement. Original patent was for the term of fourteen years, but it was subsequently extended by the Commissioner of Patents for the term of seven years from and after the expiration of the original term. Alleged defects existed in the original specification, and in consequence thereof, the plaintiff, on the 3d of February, 1863, surrendered the letters patent, and the same were reissued to him in three new patents for separate and distinct parts of the invention for the unexpired portion of the original and extended terms of the patent.

Damages are claimed of the defendants for infringing the reissued letters patent from the day of the reissue to the 24th of February, 1865, as more fully set forth in the declaration.

* 10 Howard, 494. † 1 Wallace, Jr., 341.

Pleas to the declaration were subsequently filed by the defendants, and the record shows that they gave due notice of certain special defences which they proposed to offer in evidence under the general issue, in pursuance of the act of Congress in such case made and provided. Before the day for the trial came, however, the parties filed an agreement waiving a jury and submitting the cause to the court, stipulating that the decision of the court should have the same effect as the verdict of a jury. Leave to amend was subsequently granted by the court to both parties.

Purport of the amendment to the declaration was, that the plaintiff was the sole owner of the letters patent for the county of Union, in the State of Pennsylvania, from the date of the reissued letters patent to the 24th of February, 1865, and that the defendants had infringed the same throughout that period, by making and using the invention, and vending the same to others to be used without his license or consent.

Defendants filed another special plea, in which they alleged that the plaintiff, when he commenced his suit, was not the owner of the exclusive right secured in the reissued letters patent within any part of the United States; that in certain States and districts he had parted with all his interest in the patent; and that, on the said 24th of February, he assigned and transferred an undivided half of all the residue of his right, title, and interest in the same, and, therefore, that the plaintiff had no right to bring this action in his own name against the defendants. Plaintiff demurred to the plea, and the defendants joined in demurrer. Parties were heard, and the court rendered judgment for the defendants, and the plaintiff sued out this writ of error.

Conceded fact is, that the plaintiff was the exclusive owner of the patent in the territorial district where the alleged infringement was committed, throughout the entire period of the infringement, as alleged in the declaration. Express allegation of the declaration is to that effect, and, as the plea is in avoidance and contains no denial of the matters alleged in the declaration, they must be considered as ad-

mitted, unless the matters alleged in the special plea are a sufficient answer to the action.

Briefly stated, the matter alleged in avoidance of the right of the plaintiff to maintain the suit is, that he, before he commenced the suit, but subsequent to the infringement, sold and assigned an undivided half of his patent for the territorial district where the infringement was committed, to a third person.

Patentees have secured to them, by virtue of the letters patent granted to them, the full and exclusive right and liberty, for a prescribed term, "of making and using, and vending to others to be used," their respective inventions or discoveries; and, whenever their rights, as thus defined, are invaded by others, they are entitled to an action on the case to recover actual damages as compensation for the injury.*

Such damages may be recovered by action on the case in any Circuit Court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right, as already defined, within and throughout a specified part of the United States.†

Assignees and grantees, as well as the patentee, may, under some circumstances, maintain an action on the case for an infringement, in their own name, as appears by the express words of the act of Congress. An assignee is one who holds, by a valid assignment in writing, the whole interest of a patent, or any undivided part of such whole interest, throughout the United States.‡

Where the patentee has assigned his whole interest, either before or after the patent is issued, the action must be brought in the name of the assignee, because he alone was interested in the patent at the time the infringement took place; but where the assignment is of an undivided part of the patent, the action should be brought for every infringement committed subsequent to the assignment, in the joint names of

* 5 Stat. at Large, 123, § 14. † Ib. ‡ Id. 121, § 11.

the patentee and assignee, as representing the entire interest.*

Settled view at one time was, that the grantee of a territorial right, for a particular district, could not bring an action on the patent in his own name; but the act of Congress having made him a party interested in the patent, it is now equally well settled that he may sue in his own name for invasion of the patent in that territorial district, as no one else is injured by any such infringement.†

Both assignees and grantees have an interest in the patent, but the terms are not synonymous, as used in the patent law.‡

Grants, as well as assignments, must be in writing, and they must convey the exclusive right, under the patent, to make and use, and vend to others to be used, the thing patented, within and throughout some specified district or portion of the United States, and such right must be exclusive of the patentee, as well as of all others except the grantee. Suits for infringement in such districts, if committed subsequent to the grant, can only be brought in the name of the grantee, as it is clear that no one can maintain such an action until his rights have been invaded, nor until he is interested in the damages to be recovered.

Alleged infringement in this case was committed in the county of Union, in the State of Pennsylvania, and the admitted fact is, that the plaintiff, throughout the entire period of the infringement, was the sole owner of the exclusive right to make and use, and grant to others to make and use, the thing patented in that territorial district, by virtue of his original title as patentee, having never assigned or granted any right, title, or interest, within that county.§

* Herbert v. Adams, 4 Mason, 15; Curtis on Patents (3d ed.), § 347; Gayler et al. v. Wilder, 10 Howard, 477; Whittemore v. Cutter, 1 Gallison, 480; Woodworth v. Wilson, 4 Howard, 712.

† Tyler v. Tuel, 6 Cranch, 324; Gayler et al. v. Wilder, 10 Howard, 477; Curtis on Patents, § 346.

‡ Potter v. Holland, Law's Digest, 157.

§ 5 Stat. at Large, 121, § 11.

Grant that these views are correct, and it is clear that unless the plaintiff can maintain the action there can be no redress, as it is too plain for argument, that a subsequent assignee or grantee can neither maintain an action in his own name, or be joined with the patentee in maintaining it for any infringement of the exclusive right committed before he became interested in the patent. Undoubtedly the assignee *thereafter* stands in the place of the patentee, both as to right under the patent and future responsibility; but it is a great mistake to suppose that the assignment of a patent carries with it a transfer of the right to damages for an infringement committed before such assignment.

Comment upon the cases cited, as supporting this proposition, is unnecessary, as it is clear to a demonstration that they give it no countenance whatever. Such a proposition finds no support in any decided case, nor in the act of Congress upon the subject.

True meaning of the word interested, as employed in the last clause of the fourteenth section of the Patent Act, when properly understood and applied, is, that the right of action is given to the person or persons owning the exclusive right at the time the infringement is committed. Subsequent sale and transfer of the exclusive right are no bar to an action to recover damages for an infringement committed before such sale and transfer.

The reason for the rule is, that the assignee or grantee is not interested in the damages for any infringement committed before the sale and transfer of the patent. Correct interpretation of the words, person or persons interested, is, that the words mean the person or persons interested in the patent at the time when the infringement was committed, which is the cause of action for which the damages may be recovered.*

Assignment was made in that case after suit was brought, but before the final decree. Proof of the fact was offered, and a motion filed to dismiss the case, but the court over-

* Dean v. Mason et al., 20 Howard, 198.

ruled the motion, because the assignees could have no interest in a suit for an infringement committed before their right accrued.*

Attempt is made to distinguish the case at bar from the rule established in those cases, but, in the view of this court, without success.

JUDGMENT REVERSED. NEW VENIRE ORDERED.

RANDALL v. BRIGHAM.

1. An action for damages does not lie against a judge of a court of general jurisdiction, for removing, whilst holding court, an attorney-at-law, from the bar, for malpractice and misconduct in his office, the court being empowered by statute to remove attorneys for "any deceit, malpractice, or other gross misconduct;" and having heard the attorney removed, in explanation of his conduct in the transaction which was the subject of complaint. And such action will not lie against the judge, even if the court, in making the removal, exceeds its jurisdiction, unless perhaps in the case where the act is done maliciously or corruptly.
2. All judicial officers are exempt from liability, in a civil action, for their judicial acts, done within their jurisdiction; and judges of superior or general authority, are exempt from such liability, even when their judicial acts are in excess of their jurisdiction, unless perhaps where the acts in excess of their jurisdiction are done maliciously or corruptly.
3. Formal allegations, making specific charges of malpractice or unprofessional conduct, are not essential as a foundation for proceedings against attorneys. All that is requisite to their validity, is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or injustice, is a matter of judicial regulation.
4. The construction given to a provision of the constitution of a State, by the highest court of that State, not called in question by any conflicting decision of that court, is conclusive upon this court.

ERROR to the Circuit Court for the District of Massachusetts.

This action was brought by the plaintiff, who was formerly an attorney and counsellor-at-law in Massachusetts,

* Kilborn v. Rewee, 8 Gray, 415; 1 Hilliard on T. 521; Eades v. Harris, 1 Younge & Collier, 230.

against the defendant, who was one of the justices of the Superior Court of that State, for an alleged wrongful removal by him, of the plaintiff from the bar.

The substantial facts, as established by the evidence produced by the plaintiff, and by the records of the State court, introduced by consent, upon which the removal was made, were these:

In August, 1864, one Leighton was arrested upon a charge of larceny, and confined in jail in Boston to await the action of the grand jury in the Superior Court, upon his failure to give a recognizance with sureties in four hundred dollars, required for his appearance. While thus confined, he retained the plaintiff as his attorney, to whom he expressed a willingness to enlist in the army or navy of the United States, if the prosecution could be discontinued. The plaintiff thereupon proposed to the district attorney to dispose of the prosecution in this way. That officer declined to accede to the proposition at that time, but encouraged the plaintiff to expect that he would not object to such an arrangement in court, if the presiding judge approved of it, when the indictment was presented.

The plaintiff and his father, without any further arrangement with the district attorney, thereupon became sureties for Leighton, who, upon his release, proceeded to the office of the plaintiff, and there signed with his mark—he not being able to write—an agreement to enlist as a substitute for one Brown, of Lowell, for four hundred dollars, which sum was to be retained by the plaintiff, without any subsequent claim upon him, as indemnity for his becoming surety on the recognizance, and also to pay the plaintiff four hundred dollars for furnishing bail.

Leighton subsequently enlisted in the naval service as a substitute for Brown, who paid the plaintiff, for the enlistment, eight hundred and thirty dollars. Of this sum, the plaintiff gave Leighton, when the latter went on board the vessel to which he was assigned, the sum of ten dollars. Subsequently he paid one hundred dollars to Leighton's order. The balance he retained.

Statement of the case.

Some weeks afterwards, Leighton wrote a letter to the captain of his vessel, stating that he was promised four hundred dollars for his enlistment, by his lawyer, the plaintiff; that he had only received ten dollars; and that, when he applied to the plaintiff for settlement, evasive answers were all he obtained. He referred, in the letter, to the fact that he had a wife and two children dependent upon him for support, and he appealed to the captain to see that justice was done him. This letter was shown to the plaintiff, who replied that he had paid Leighton all he had agreed to, and should not pay him another cent. The wife of Leighton also applied to the plaintiff for a portion of the bounty of her husband, in his hands, stating that the destitution of herself and children was such that she should be obliged to give them up to the city, to whom he replied by advising her to do so, and gave her nothing.

The captain then sent the letter to the grand jury of the county, at the time sitting upon Leighton's case. The jury, of course, could not act upon the letter, and its foreman requested the prosecuting officer to bring it before the court. This was accordingly done, the defendant being at the time the presiding justice. The plaintiff was thereupon sent for, and, in open court, his attention was called to the letter, and it was notified to him that on the following Wednesday, then five days distant, his professional conduct and standing at the bar would be considered.

At the time designated, he appeared, and showed that, after his citation, he had paid to Leighton the balance of the four hundred dollars, which Leighton claimed he was entitled to receive. This right of Leighton was never admitted until after the attention of the court had been directed to the matter.

The court being of opinion that the plaintiff took advantage of the situation of Leighton, and obtained from him an agreement, which, under the circumstances, was unconscionable and extortionate, and therefore grossly unprofessional; that he had induced Leighton to enlist by making him believe that his release from the prosecution would be accom-

plished by his enlistment, and that the money obtained by the enlistment subsequently paid to Leighton was paid only in consequence of the inquiry instituted into the professional conduct of the plaintiff, he having previously denied that he was bound to pay anything, found that he had violated his oath of office as an attorney-at-law, and was guilty of malpractice and gross misconduct in his office, and consequently ordered that he be removed from his office as an attorney-at-law within the commonwealth of Massachusetts. Thereupon, the plaintiff brought this suit. The declaration charged the removal to have been made without lawful authority, and wantonly, arbitrarily, and oppressively.

Upon the evidence produced, the court below instructed the jury that the action could not be maintained, and that their verdict should be for the defendant. Such verdict was accordingly rendered, and the plaintiff brought the case here.

The general statutes of Massachusetts* provide that "an attorney may be removed by the Supreme Judicial Court or Superior Court, for any deceit, malpractice, or other gross misconduct;" and also that "a person admitted in any court may practise in every other court in the State; and there shall be no distinction of counsellors and attorneys."

The oath required of attorneys on their admission is as follows:

"You solemnly swear that you will do no falsehood, nor consent to the doing of any in court; you will not wittingly or willingly promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same; you will delay no man for lucre or malice; but you will conduct yourself in the office of an attorney, within the courts, according to the best of your knowledge and discretion, and with all good fidelity as well to the courts as your clients. So help you God."

The Superior Court of Massachusetts is a court of general jurisdiction. Indeed, its jurisdiction is the most general of any court in Massachusetts.†

* C. 121, § 84.

† General Statutes, c. 114.

Mr. Randall, plaintiff in error, in propriâ personâ:

I. The plaintiff's office of attorney-at-law is property. And it has been variously declared by the courts to be a "license," a "privilege," a "franchise," a "freehold," a "right to practise law in courts," a "profession which is the high road to wealth and distinction."

The grant of the "office of attorney," at common law, is the grant of an office for the life, or during the good behavior, of the grantee.

In *Hurst's Case*,* a mandamus was granted to restore an attorney to his office, because, declares Lord Holt,

"He is an officer concerning the public justice, and is compellable to be attorney for any man, and has a *freehold* in his place."

In *Ex parte Garland*,† this court says:

"An attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency."

In *Ex parte Austin*,‡ Gibson, C. J., delivering the opinion of the Supreme Court of Pennsylvania, thus speaks:

"An attorney-at-law is an officer of the court, and his office is an office *for life*. The grant of an office without express limitation at common law being taken most strongly against the grantor, endures for the life of the grantee; and though the principle has not been applied to offices within the grant of the executive, it must necessarily be applied to the office of attorney. For, to subject the members of the profession to removal at the pleasure of the court, would leave them too small a share of the independence necessary to the duties they are called upon

* 1 Levinz, 75. † 4 Wallace, 333. ‡ 5 Rawle, 194.

to perform to their clients and to the public. As a class, they are supposed to be, and, in fact, have always been, the vindicators of individual rights, and the fearless assertors of the principles of civil liberty; existing, where alone they can exist, in a government, not of parties or men, but of laws."

And this view of the dignity of the attorney's office is supported by all authorities.*

II. The constitution of Massachusetts ordains as follows:

"No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and *formally*, described to him. And every subject shall have a right to meet the witnesses against him, face to face, and to be fully heard in his defence."

"And no subject shall be deprived of his property, immunities, or privileges, but by the judgment of his peers, or the law of the land."

At the common law, the words *crime* and *offence* are used as synonymous and universal terms, and as comprehending every act for which a forfeiture of any legal right might be worked, or penalty imposed, or punishment inflicted, in any form of judicial proceeding.†

* 7 Bouvier's Bacon Abr., title "Office," 308; Gillman v. Wright, 1 Siderfin, 410; White's Case, 6 Modern, 18; King v. Sheriff of York, 2 Shower, 154; In re the Justices of Antigua, 1 Knapp's Privy Council, 267; In re King, 8 Q. B. 129; Ex parte Hennen, 13 Peters, 259; Ex parte Swett, 20 Pickering, 1; Ex parte Secombe, 19 Howard, 9; Ex parte Burr, 9 Wheaton, 529; Ex parte Sayre, 7 Cowen, 868; Ex parte Leigh, 1 Mumford, 481; Ex parte Fisher, 6 Leigh, 619; "Judges' Opinions," 20 Johnson, 492; Anonymous, 4 Johnson, 191; Mill's Case, 1 Michigan, 392; Bradley's Case, 19 Law Reporter, 480; In re Dorsey, 7 Porter, 881; People v. Turner, 1 California, 151; Fletcher v. Daingerfield, 20 Id. 430; Commonwealth v. Judges, 1 Sergeant & Rawle, 187; Chapman's Case, 11 Ohio, 430; State of Iowa v. Start, 7 Iowa, 499; In re Cooper, 22 N. Y. 81; Bruce v. Fox, 1 Dana, 450; Vise v. Hamilton, 19 Illinois, 78; Ex parte Heyfron, 7 Howard's Mississippi, 127; The People v. Lamborn, 1 Scammon, 128.

† Bouvier's Law Dictionary, title "Crime;" 4 Blackstone's Comm. 5, 6, and note 8, Wendell's Edition; Commonwealth v. Dennison, 24 Howard, 99; 1 Chitty's Prac. 14; The King v. Shaw, 12 Modern, 118; Bonuker v. Evans, 16 Q. B. 171; James Prescott's Trial, 124.

The words, the "law of the land," mean "due process of law," and this implies that there shall be some form of legal process, sufficient allegations or charge, due notice to the party proceeded against, the opportunity to answer to and contest the charge or allegations, and to be heard or tried in a legal and regular course of judicial proceedings, by an impartial judge. And these rights exist in all cases, civil or criminal, whether by the exercise of a court's ordinary jurisdiction, with trial by jury, or by the exercise of the discretionary or summary jurisdiction of a court, without the right to trial by jury.*

III. At common law, whether a proceeding be criminal or civil, or of a mixed nature, *if it has the character of a judicial proceeding*, some form of legal process, adapted to the particular case, must universally be instituted or laid as the foundation of *the proceeding*, notice of the same given, and the opportunity presented to the party to make his defence; and to be legally and regularly tried or heard ere any judgment, or order of forfeiture, or deprivation of any *freehold office*, or other legal right, can lawfully be effected or inflicted, *for any purpose*, by any tribunal whatsoever; and if, in any *essential* particular, *the proceeding* is irregular or defective, *the conviction* will not be by "due process of law," and the judgment will be a nullity.†

* Regina v. Baines, 2 Lord Raymond, 1265; Dimes v. Canal Co., 3 House Lords, 759; Ex parte Ramshay, 18 Q. B. 187; Capel v. Child, 2 Crompton & Jervis, 558; Murray's Lessees v. Hoboken Land Co., 18 Howard, 280; Bank of Columbia v. Okeley, 4 Wheaton, 244; Greene v. Briggs, 1 Curtis, 325; In re Pitman, 1 Id. 186; Commonwealth v. Davis, 11 Pickering, 434; Commonwealth v. Dean, 21 Id. 334; Commonwealth v. Phillips, 16 Id. 213; Commonwealth v. Blood, 4 Gray, 32; Fisher v. McGirr, 1 Id. 37; Taylor v. Porter, 4 Hill, 146; Wynehamer v. The People, 3 Kernan, 392; In re Dorsey, 7 Porter, 405; Bank of Columbia v. Ross, 4 Harris & McHenry, 455; McGinnis v. State, 9 Humphreys, 43; Murry v. Askew, 6 J. J. Marsh. 27; Wells v. Caldwell, 1 Marshall, 441; Lewis v. Garrett, 5 Howard's Mississippi, 434; Hoke v. Henderson, 4 Devereux, 15; Ervine's Appeal, 16 Pennsylvania State, 263; Norman v. Heist, 5 Watts & Sergeant, 171.

† Rex v. Lediard, Sayer, 6; The Queen v. Saddlers' Co., 10 House Lords, 404; The Queen v. Smith, 5 Q. B. 621; In re Monckton, 1 Moore's Privy Council, 455; Bowerbank v. Bishop of Jamaica, 2 Id. 470; Smith v. Justices

IV. "Due process of law," in the case of attorneys-at-law, is held to require, whatever may be the form of process or mode of procedure, and for whatever cause (invariably limited to causes involving moral or professional delinquency), that there shall be a sufficient charge or allegation in writing, duly filed of record in court, specifying the particular offence or matter complained of (usually supported by the oath of the party preferring the accusation); and, unless waived of record, written notice served on the attorney to show cause why he should not be removed from his office, or his name stricken from the roll of attorneys, for the offence or matter complained of; and which notice should specify the time when, the place where, and the tribunal before which he is to appear and answer. The attorney is entitled to a *day in court*, on which to make defence, and the trial is to be conducted like all other trials in summary proceedings at the common law, and the attorney convicted only if the proofs shall establish or conform to the allegations.*

In numerous cases,† the judgments or orders removing the attorneys from their offices, having been made without

of Sierra Leone, 8 Id. 361; Gahan v. Lafitte, Id. 382; Willis v. Sir G. Gipps, 5 Id. 379; Wildes v. Russell, C. B. 722, Eng. Law Rep. 1866; Capel v. Child, 2 Crompton & Jervis, 558; Rex v. Gaskin, 8 Term, 209; Howard v. Gosset, 10 Q. B. 381; Bonaker v. Evans, 16 Id. 162; Ex parte Ramshay, 18 Id. 187; Ex parte Kinning, 4 C. B. 507; Dynes v. Hoover, 20 Howard, 82; Gorham v. Luckett, 6 B. Munroe, 146; Murray v. Oliver, 8 Id. 1; Greene v. Briggs, 1 Curtis, 825; Sevier's Case, Peck, 334; Sheldon v. Newton, 3 Ohio State, 498; McClure v. Tennessee, 1 Yerger, 228; United States v. Duane, Wallace's Circuit Court, 5; Ex parte Heyfron, 7 Howard, Mississippi, 127; Fletcher v. Daingerfield, 20 California, 427; People v. Turner, 1 Id. 150; Fisher's Case, 6 Leigh, 619; James Prescott's Trial, 1821, page 164, and Appendix, pages 212 to 219.

* Ex parte Burr, 9 Wheaton, 529; The People v. Turner, 1 California, 150; Iowa v. Start, 7 Iowa, 499.

† Ex parte Heyfron, 7 Howard's Miss. 127; Fletcher v. Daingerfield, 20 California, 430; People v. Turner, 1 Id. 143, S. C. 190; In re Monckton, 1 Moore's Privy Council, 455; Smith v. Justices of Sierra Leone, 8 Id. 361; In re Downie, 8 Id. 414; In re Arrindell, 8 Id. 414; Smith v. Justices of Sierra Leone, 7 Id. 174; Emerson v. The Justices of the Supreme Court of Newfoundland, 8 Id. 157.

"due process of law," were declared to be *illegal and void* (and were also reversed), by courts having a superintending or appellate jurisdiction.

V. An action on the case may be maintained at common law for the disturbance of a party in the possession and enjoyment of an office, franchise, or other incorporeal right.*

It is no objection to the maintenance of a suit simply that it involves a determination of a party's title to his office.†

VI. In an action against a judge of any court, whether of record or otherwise, for any act done by him or by his command, the question in every case to be determined is, *was the act done a judicial act, done within his jurisdiction?* If it was not, he can claim no immunity or exemption by virtue of his office from liability as a trespasser; "for if he has acted without jurisdiction, he has ceased to be a judge."‡

* Walker *v.* Lamb, Croke Car. 258; Ferrer *v.* Johnson, Croke Eliz. 836; Lee *v.* Drake, 2 Salkeld, 468; Jones *v.* Pugh, Id. 465; Hastings *v.* Prothonotary of Stepney Court, 1 Siderfin, 410; Strode *v.* Byrt, 4 Modern, 418; Crowder *v.* Oldfield, 6 Id. 19; Beau *v.* Bloom, 3 Wilson, 456; Sutherland *v.* Murray, cited in 1 Term, 538; Carrington *v.* Taylor, 11 East, 571; Thompson *v.* Gibson, 7 Meeson & Welsby, 456; Peter *v.* Kendal, 6 Barnewall & Creswell, 703; McMahon *v.* Lennard, 6 House of Lords Cases, 970; Rogers *v.* Dutt, 13 Moore's Privy Council, 209; Townsend *v.* Blewett, 5 Howard's Mississippi, 503; Wammack *v.* Holloway, 2 Alabama, 31; Palmer *v.* Fiske, 2 Curtis, 14; People *v.* Turner, 1 California, 190; Bruce *v.* Fox, 1 Dana, 450; Glen *v.* Hodges, 9 Johnson, 67.

† Arris *v.* Stukely, 2 Modern, 260; Boyter v. Dodsworth, 6 Term, 681; Drew *v.* Fletcher, 1 Barnewall & Creswell, 288; Capel *v.* Child, 2 Crompton & Jervis, 558; Lightly *v.* Clouston, 1 Taunton, 113; Wildes *v.* Russell, C. B. Law Rep. for Dec. 1866, p. 728; Hearsey *v.* Pruyn, 7 Johnson, 179; Avery *v.* Tyringham, 3 Massachusetts, 160; Allen *v.* McKeen, 1 Sumner, 317.

‡ 2 Institutes, 427; The Marshalsea Case, 10 Reports, 76 A; Floyd *v.* Barker, 12 Id. 23; Hoskins *v.* Matthews, 1 Levinz, 292; Martin *v.* Marshall, Hobart, 63; Bushell's Case, 1 Modern, 119; Hamond *v.* Howell, 2 Id. 219; Smith *v.* Bouchier, 2 Strange, 993; Groenvelt *v.* Burwell, 1 Ld. Raymond, 454; Miller *v.* Seare, 2 W. Blackstone, 1141; Perkin *v.* Proctor, 2 Wilson, 386; Mostyn *v.* Fabrigas, 1 Cowper, 161; Sutton *v.* Johnstone, 1 Term, 493; Welch *v.* Nash, 8 East, 402; Burdett *v.* Abbott, 14 Id. 1; Ackerley *v.* Parkinson, 3 Maule & Selwyn, 411; Mitchell *v.* Foster, 4 Perry & Davison, 153; S. C., 12 Adolphus & Ellis, 472; Garnett *v.* Ferrand, 9 Dowling & Ryland, 670; Van Sandau *v.* Turner, 6 Q. B. 773; Gossett *v.* Howard, 10 Id. 411; Houlden *v.* Smith, 14 Id. 841; Kinning *v.* Buchanan, 8 C. B. 271; Watson *v.* Bodell, 14 Meeson & Welsby, 70; Fergurson *v.* Kinnoull, 9 Clark &

Argument for the judge.

Mr. Dawes, who filed a brief of Mr. Allen, A. G. of Massachusetts:

I. Both the admission and removal of attorneys are judicial acts.*

II. It is a general principle, applicable to all magistrates, even to those of inferior jurisdiction, that they are not liable to an action for any judicial act done within their jurisdiction. In reference to inferior magistrates, it has been said that they are only protected while they act within their jurisdiction.

But in reference to judges of courts of general jurisdiction, the rule is not thus limited. Such judges are not liable to actions for their judicial acts, whether within or without their jurisdiction.

1. The extent of a judge's jurisdiction is often the very question which he is called on judicially to determine. To decide upon this question is as much a judicial decision as any other. And the question may be a difficult and doubtful one. Yet he is bound to decide, and to decide according to his judgment. But shall he decide in fear or peril of a lawsuit?

2. The reason applicable to inferior magistrates does not apply. There must be some point in the administration of the law where unqualified confidence is to be reposed and acknowledged; some ultimate repository of justice, so far as individuals are concerned. In England, the king's judges

Finelly, 296; Miller v. Hope, 2 Shaw's Appeal Cases, H. L. 125; Calder v. Halket, 3 Moore's Privy Council, 28; Taaffe v. Downes, Id. 86; Gahan v. Lafitte, Id. 382; Hill v. Bigge, Id. 465; Wise v. Withers, 3 Cranch, 331; Anderson v. Dunn, 6 Wheaton, 204; Kendall v. Stokes, 3 Howard, 89; Mitchell v. Harmony, 13 Id. 144; Dynes v. Hoover, 20 Id. 65; Yates v. Lansing, 5 Johnson, 282; Bigelow v. Stearns, 19 Id. 39; Cunningham v. Bucklin, 8 Cowen, 178; Horton v. Auchmoody, 7 Wendell, 200; Bevard v. Hoffman, 18 Maryland, 479; Lining v. Bentham, 2 Bay, 1; Miller v. Grice, 2 Richardson, 27; Greene v. Mumford, 5 Rhode Island, 472; Scovil v. Geddings, 7 Ohio, 566; Piper v. Pearson, 2 Gray, 120; Clarke v. May, Id. 410; Kelly v. Bemis, 4 Id. 88; Noxon v. Hill, 2 Allen, 215; Revill v. Pettit, 8 Metcalf, Kentucky, 314.

* Ex parte Secombe, 19 Howard, 9, 15; Ex parte Garland, 4 Wallace, 378, 379.

occupy this position; the judges of courts of general jurisdiction. To them is delegated the whole judicial power of the sovereign; and they are responsible to the sovereign alone.* As long ago as 1608, in *Floyd & Barker's Case*,† it was said:

"The reason and cause why a judge, for anything done by him as judge, by the authority which the king hath committed to him, and as sitting in the seat of the king (concerning his justice), shall not be drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this: the king himself is *de jure* to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath. And forasmuch as this concerns the honor and conscience of the king, there is great reason that the king himself shall take account of it, *and no other.*"

This general doctrine is especially applicable in America, where, by our National and State constitutions, judicial power is vested exclusively in the courts. The duties of a judge are public duties imposed by law. He must perform them. If he acts corruptly or incompetently, he may be impeached. And in Massachusetts, he may be removed by the governor, with consent of the council, upon the address of both houses of the legislature.

It is inconsistent with the nature and true theory of the judicial functions, that an action should lie against a superior judge, for any judicial act, even though in excess of his jurisdiction.

3. The very foundation of this principle is to protect judges *when they have erred.* If they have decided rightly, they need no protection, for the correctness of their decision will vindicate them. To secure the maximum of impartiality, a judge must be protected from personal responsibility for his errors, if he happens to make any. It would be absurd to say that

* Taaffe v. Downes, in note, 3 Moore's Privy Council, 41.

† 12 Reports, 23.

he should receive the protection of the law only in those cases where no protection is required.*

Accordingly, for more than five hundred years, by a uniform series of decisions, judges have been held exempt from personal responsibility for their judicial words and acts.†

Consider the results which would follow from a contrary doctrine. Suppose that the defendant consulted several of his associates, who all concurred with him, or suppose that two or more of the justices acted together upon this matter, and that they nevertheless came to a wrong decision, would all be liable in damages? If so, should they be sued jointly or severally? In case one dissented, should he be held liable with the rest, or should he, by reason of his dissent, be exonerated, and the rest held liable? This would be to offer a bounty on dissent. Suppose the case was carried by appeal, or otherwise, before another tribunal, which ratified the doings of the first, and yet this court should think both tribunals mistaken, should the justices of the higher tribunal be also liable in damages? And if so, should they be sued separately, or jointly with the justices of the Superior Court? Are the justices of the Supreme Judicial Court of Massachusetts, who held that the doings of defendant, now sued, were, in all respects, conformable to the constitution and

* See Taafe *v.* Downes, *supra*, 533.

† (A.D. 1354.) Book of Assizes, 27 Edw. III, pl. 18; (A.D. 1431.) 1 Rolle's Abridgment, 92; 9 Hen. VI, 60, B.; (A.D. 1561.) Gwynne *v.* Poole, Lutwyche, 937, *arguendo;* (A.D. 1589.) Green *v.* Hundred of Buccles Church, 1 Leonard, 323, *arguendo;* (A.D. 1606.) Floyd & Barker's Case, 12 Reports, 23; (A.D. 1616.) Bagg's Case, 11 Id. 93 *b;* (A.D. 1621.) Aire *v.* Sedgwicke, 2 Rolle, 199; (A.D. 1633.) Metcalfe *v.* Hodgson, Hutton, 120; Bushell's Case, 1 Modern, 119; Hamond *v.* Howell, Id. 184; S. C. 2 Mod. 218; Groenvelt *v.* Burwell, 1 Ld. Raymond, 454; S. C. 1 Salkeld, 200; Anon. 1 Salkeld, 201; Mostyn *v.* Fabrigas, 1 Cowper, 172; Duke of Newcastle *v.* Clark, 8 Taunton, 632; Garnett *v.* Ferrand, 6 Barnewall & Creswell, 611; Miller *v.* Hope, 2 Shaw's Appeal Cases, 125; Kemp *v.* Neville, 7 Jurist (N. S.), 913; Scott *v.* Stansfield, Law Reports, 3 Exchequer, 220; Brodie *v.* Rutledge, 2 Bay, 69; Phelps *v.* Sill, 1 Day, 315; Yates *v.* Lansing, 5 Johnson, 283; S. C. 9 Id. 395; Cunningham *v.* Bucklin, 8 Cowen, 178; Weaver *v.* Devendorf, 3 Denio, 117; Burnham *v.* Stevens, 33 New Hampshire, 247; Kelley *v.* Dresser, 11 Allen, 31.

laws, also liable in damages? If so, before what tribunal should they be sued? If small damages were claimed, would a justice of the peace, or a judge of inferior jurisdiction, have authority to entertain the case, and pass upon the question whether his superior judges acted and decided rightly or wrongly? It cannot be that such is the law. "There is no court," it was said in *Le Caux* v. *Eden*,* "equal to the trial of a superior judge." Were the law otherwise (to use the words of Lord Stair†), "no man but a beggar or a fool would be a judge."

This question does not depend upon reasoning alone. The case of *Ackerley* v. *Parkinson*‡ is in point, and other cases are to the same effect.§

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The Superior Court of Massachusetts is a court of general jurisdiction, and is empowered by statute to admit attorneys and counsellors to practise in the courts of the State, upon evidence of their possessing good moral character, and of having devoted a prescribed number of years to the study of the law, in the office of some attorney in the State, and to remove them "for any deceit, malpractice, or other gross misconduct."

Both the admission and the removal of attorneys are judicial acts. It has been so decided in repeated instances. It was declared in *Ex parte Secombe*,‖ and was affirmed in *Ex parte Garland*.¶

Now, it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held

* Douglas, 594.

† 2 Shaw's Appeal Cases, 134.

‡ 3 Maule & Selwyn, 411.

§ The Marshalsea, 10 Reports, 68 b; Gwynne v. Poole, Lutwyche, 937; Lowther v. Earl of Radnor, 8 East, 118; Truscott v. Carpenter, Ld. Raymond, 229; Yates v. Lansing, 5 Johnson, 289.

‖ 19 Howard, 9.

¶ 4 Wall. 378.

that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and be called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts.

This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement.

In England the superior judges are the delegates of the king. Through them he administers justice, and to him alone are they accountable for the performance of their trust. And it was said as long ago as 1608, as reported by Lord Coke in Floyd and Barker's case,* that insomuch as the judges of the realm have the administration of justice, under the king, to all his subjects, they ought not to be called in question for any judicial proceedings by them, except before the king himself, "for this would tend to the scandal and subversion of all justice; and those who are most sincere would not be free from continual calumniations."

* 12 Coke, 25.

Opinion of the court.

In the United States, judicial power is vested exclusively in the courts. The judges administer justice therein for the people, and are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. In some States, and Massachusetts is one of them, they may be removed upon the address of both houses of the legislature. But responsible they are not to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.

In *Taaffe* v. *Downes*,* this subject was most elaborately and learnedly considered, and all the English authorities commented upon, by the Court of Common Pleas of Ireland, in 1813. The defendant was chief justice of the King's Bench in Ireland, and had issued a warrant at chambers for the arrest of the plaintiff for a breach of the peace. The plaintiff was accordingly arrested and held to bail; and he afterwards brought an action against the chief justice for assault and false imprisonment. It was urged, in argument, that it was not lawful or defensible for a judge, without any offence committed, or charge made upon oath of crime, or suspicion of crime committed, to imprison a subject. But it was held that the action would not lie against the judge for acts judicially done by him. "Liability," said Mr. Justice Mayne, one of the justices of the court, "to every man's action, for every judicial act a judge is called upon to do, is the degradation of the judge, and cannot be the object of any true patriot or honest subject. It is to render the judges slaves in every court that holds plea, to every sheriff, juror, attorney, and plaintiff. If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing

* Given in a note in 3 Moore's Privy Council, 41.

persecution, and establish its weakness in a degrading responsibility." And the justice observed that no action of the kind was ever sustained, and save one in London and one in Ireland, none was ever attempted. The one mentioned as arising in Ireland was not against any judges, but against the governor of the country, and may perhaps be subject to other considerations. In the case in London,* the action was against the recorder, who, as one of the judges of *oyer and terminer*, had fined and imprisoned a petit jury for rendering a verdict against the direction of the court and the evidence. This act was declared illegal, by the Court of Common Pleas, in discussing the case on *habeas corpus*.† Upon that decision the action was brought by one of the jurors, but the court held that the action would not lie, and were of opinion "that the bringing of the action was a greater offence than the fining of the plaintiff, and committing of him for non-payment; and that it was a bold attempt, both against the government and justice in general."

Mr. Justice Fox, in the case of *Taaffe* v. *Downes*, conceded that the act of the chief justice was illegal, but held that he was not responsible in the action, and observed that, without the existence of the principle, that a judge, administering justice, shall not be liable for acts judicially done, by action or prosecution, it was utterly impossible that there should be such a dispensation of justice as would have the effect of protecting the lives or property of the subject. "There is something," he said, "so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the judges, an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject."

The same subject was considered very elaborately in the case of *Yates* v. *Lansing*,‡ in the Supreme Court and in the

* Hamond v. Howell, 1 Modern, 184; 2 Id. 218.

† Bushell's Case, Vaughan, 135.

‡ 6 Johnson, 283; 9 Id. 395.

Court of Errors of New York. Lansing was chancellor of the State, and had committed Yates, one of the officers in chancery, for malpractice and contempt. A judge of the Supreme Court discharged him, and thereupon the chancellor ordered him to be recommitted. He then brought an action to recover a statute penalty for the recommittent. It was held that the action would not lie, Mr. Chief Justice Kent observing that the chancellor may have erred in judgment in calling an act a contempt which did not amount to one, and in regarding a discharge as null when it was binding, and that the Supreme Court may have erred in the same way, but still it was but an error of judgment for which neither the chancellor nor the judges were or could be responsible in a civil action, and that such responsibility would be an anomaly in jurisprudence. "Whenever," said the learned chief justice, "we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public they become contemptible."

The Superior Court of Massachusetts, as we have already stated, is a court of general jurisdiction, and is clothed by statute with authority to admit and to remove attorneys-at-law. The order removing the plaintiff was made by the court, and not by the judge in chambers. The inquiry into his conduct was before the court, and before it he was notified to appear. His claim is that the court never acquired jurisdiction to act in his case, because there was not a formal accusation made against him, or statement of grounds of complaint, and formal citation issued to him to answer them. If this were so, his case would not be advanced. Under the authorities cited he could not seek redress in that event by an action against the judge of the court, there being no pretence or shadow of ground that he acted maliciously or corruptly. But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the

transaction to which the letter referred. The informality of the notice, or of the complaint by the letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charge against him; and it is not pretended that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct. He introduced testimony upon the matter, and was sworn himself.

It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.

The authority of the court over its attorneys and counsellors is of the highest importance. They constitute a profession essential to society. Their aid is required not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands, and confided to their management. The confidence which they receive and the responsibilities which they are obliged to assume demand not only ability of a high order, but the strictest integrity. The authority which the courts hold over them, and the qualifications required for their admission, are intended to secure those qualities.

The position that the plaintiff has been illegally deprived of rights which he held under the constitution of Massachu-

setts, which declares that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him;" nor be "despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land,"* is answered by the construction which the Supreme Court of that State has given to these provisions. It has held that the proceeding taken for the removal of the plaintiff could not in any just and proper sense be deemed a criminal procedure, in which a party has a right to a full, formal, and substantial description of the offence charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process according to the signification of the words "*per legem terræ*" as used in Magna Charta, or in the Declaration of Rights.† This construction of the highest court of the State, not called in question by any conflicting decision of that court, is conclusive upon us.‡

We find no error in the ruling of the Circuit Court, and its judgment must therefore be

AFFIRMED.

PALMER v. DONNER.

A district judge has no authority to sign a citation upon a writ of error to a State court. When the citation has been thus signed, the writ of error will be dismissed on motion.

THIS was a motion, made by *Mr. J. H. Bradley*, to dismiss a writ of error directed to the Supreme Court of the State of California, on the ground that the citation had been signed by a district judge, which the record showed was the fact.

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* Declaration of Rights, Art. 12.

† Randall, Petitioner for Mandamus, 11 Allen, 478.

‡ Provident Institution v. Massachusetts, 6 Wallace, 630.

Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

The revisory jurisdiction of this court over the judgments of State tribunals, is defined by the twenty-fifth section of the Judiciary Act of 1789. It is there provided that the citation must be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. But the citation in the case before us, was signed by a district judge. This was without authority of law, and the citation was, therefore, without effect. The case therefore is not properly in this court, and the writ of error must be

DISMISSED.

COPPELL v. HALL.

1. A contract made by a consul of a neutral power, with the citizen of a belligerent State, that he will "protect," with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void.
2. During the late rebellion the President alone had power to license commercial intercourse between places within the lines of military occupation, by forces of the United States, and places under the control of insurgents against it. Hence the general orders of the officer of the United States, commanding in the department, could give no validity to such intercourse.
3. Where suit is brought upon a contract which is void as against public policy and the laws, a party who pleads such invalidity of it does not render the plea ineffective by a further defence in "reconvention;" a defence of this sort, to wit, that, if the contract be valid, he himself takes the position of a plaintiff, and makes a claim for damages for its non-performance.

IN error to the Circuit Court for the Eastern District of Louisiana.

The case was this:

During the late civil war the city of New Orleans was in military occupation of the United States forces, and most of the neighboring cotton region around, in military possession of rebel enemies.

In this state of things, a circular of the treasury, of July 3, 1863, declared it to be the intention of that department to allow no intercourse at all beyond the national and within the rebel lines of military occupation. "Across these lines," was its language, "there can be no intercourse, except that of a character exclusively military."

A treasury regulation also said:

"Commercial intercourse with localities beyond the lines of military occupation by the United States forces, is strictly prohibited; *and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States.*"

This regulation was made under an act of Congress,* which, forbidding all commercial intercourse between territory proclaimed by the President to be in insurrection (which the territory about New Orleans had been, though New Orleans was not), and the citizens of the rest of the United States, and enacting that all merchandise coming from such territory into other parts of the United States, should be forfeited, authorized the PRESIDENT to permit such intercourse, in such articles, for such time, and by such persons as he might deem proper; *providing*, however, that such intercourse, so far as licensed, should be carried on *only in pursuance of rules and regulations prescribed by the Treasury Department.*

By the general orders of the Military Department of the Gulf, however, dated March 7 and September 3, 1863, the trade of the Mississippi, within that department, was permitted, subject to such restrictions only as should be necessary to prevent the supply of provisions and munitions of war to the enemy. The products of the country were authorized to be brought to New Orleans, and other designated points within the military lines of the United States, and to be sold by the proprietors or their factors.

In this state of orders, civil and military, George Coppell,

* Act of July 13, 1861, 12 Stat. at Large, 257, § 5.

a British subject, and acting British consul, at New Orleans, and trading there (William Mure being the consul), made a contract, through one *James Gonegal*, with a certain Hall, a citizen of Louisiana, residing like Coppell in New Orleans, but both being, at the time of the contract, in rebel territory, by which Hall agreed to "furnish" the said Coppell with a large number of bales of cotton, all of it being then in rebel territory, and owned chiefly by one Mann, also a citizen of Louisiana, resident apparently in the rebel region of it; cotton being at the time an article specially sought for by both combatants; shielded and preserved by each while it was in his own possession, and destroyed when found, without an ability on his own part to capture it, in possession of the other. By this contract, Coppell on his part agreed "to cause said cotton to be *protected* and *transported* to New Orleans, and *disposed of* to the best advantage, paying to said Hall, first, the actual cost of it, with two-thirds of the net profits, &c., without commissions, retaining *one-third* of the profits as his compensation." Coppell now marked a large part of the cotton with his private mark, and soon afterwards issued certificates (the marks and other designations of the cotton being set forth on a document appended), in this form:

HER BRITANNIC MAJESTY'S CONSULATE FOR THE STATE OF LOUISIANA:

Know all persons to whom these presents shall come, that I Wm. Mure, Esq., her Britannic Majesty's consul for the city of New Orleans and State of Louisiana, *do hereby certify* that on the day of the date hereof personally appeared before me *Mr. James Gonegal*, who being by me duly sworn, says, that the twenty bales cotton, as described on the document hereunto attached, *is the property of and belongs to a British subject, and is duly registered as such at this consulate.*

Given under my hand and seal of office, at the city of New Orleans, in the State of Louisiana, the eighth day of October, one thousand eight hundred and sixty-three.

GEORGE COPPELL,
H. B. M.'s Acting Consul.

Under these "protections," and escaping destruction from either government or rebels, the cotton remained on Mann's estate, in the rebel region, and in his and Hall's charge, until the rebel forces there surrendered to the government. The whole region coming thus again under the control of the United States, and it becoming easy to transport cotton from the surrounding country to New Orleans, and there to dispose of it to advantage at a rate of factorage much less than one-third the profits, Hall and Mann declined to furnish Coppell with the cotton. Coppell, thereupon, in the court below, by petitions, in which, referring to the contract as made "under the permission" expressed in military general orders, and alleging that he had been able and desirous to bring the cotton to New Orleans at the time of the contract, and that Hall and Mann had prevented him, to his damage $50,000; now demanded possession of the cotton "for the purposes enumerated in the agreement," or if he should be adjudged not entitled to such possession, then to have damages.

The defendants set up that the contract was null and void; as being in violation of public policy of the laws of the United States, and of the neutrality which Coppell, as a British subject, was bound to maintain. But that "*if*" it should be determined that the contract was valid, then that they, the said respondents, "assuming the positions of *plaintiffs* in reconvention," averred that Coppell was indebted to them in damages $70,000, for not having transported the cotton to New Orleans under British protection, and sold it during the war; every of which things it was alleged that he was unable to do, and none of which he had ever attempted or offered to do. And they prayed that he "might be cited to appear and answer this *reconventional* demand."

Coppell replied, that he was the consul of Her British Majesty; that he did protect the cotton from all seizures which his agreement included; and that, as soon as the military situation permitted, he was ready and willing to perform all the stipulations of his agreement, and tendered the neces-

sary means for the transportation of the cotton to New Orleans; which tender the defendants declined.

The court below charged:

1. That Hall and the plaintiff, both residing in New Orleans, the contract was valid under the law of nations.

2. That the military orders, then in force, authorized and gave validity to the contract.

3. That the demand for reconvention, set up by the defendants, "cured any nullity or illegality in the contract, if any existed, and that, under the pleadings, the plaintiff might recover, notwithstanding such illegality."

And judgment having been given for the plaintiff for $29,644, the case was brought by the defendants here.

Messrs. Evarts and Ashton, for the plaintiffs in error:

I. The court in effect instructed the jury:

1st. That a British subject, domiciled at New Orleans, could make a valid contract, during the war, with a citizen of the United States, by which such British subject should agree to cover and protect, with his neutral British name, cotton situated in the hostile territory within the rebel lines; and,

2d. That a contract between such citizen and a British consul at New Orleans, by which the latter agreed to issue false certificates that such cotton was British property, with a view to its protection within the rebel lines, was a valid contract, enforceable in a court of the United States by that British consul.

It needs no argument to disclose the error of such rulings. We should suppose no one would have the hardihood to doubt that such a contract was absolutely void, as against public policy, and as in contravention of the belligerent rights of the United States.* Nor do we believe that this court will tolerate, for one moment, the monstrous doctrine, that the issuing, by a British consul residing in our jurisdiction, of false and fraudulent papers, asserting that property

* Patton v. Nicholson, 3 Wheaton, 204.

in the enemy's country belonged to British subjects, is a consideration which will sustain a contract between that consul and a citizen of the United States.*

II. The military orders did not authorize the contract sued on. At the date of the contract all commercial intercourse with territory beyond our lines of military occupation in Louisiana was strictly prohibited, except with the license of the President. And no officer of the government, save the President, had any authority to permit such intercourse to be carried on by the plaintiff, and therefore no authority except that of the President could take from such a contract as this the "*sting of disability.*"†

Independently of which, they were not meant to be relied on. If they had been, the cotton would have needed no British protection.

III. As to the effect of the further defence of "reconvention," *if* the first defence failed. The ruling of the court, on this point, exhibits a total misapprehension of the character, foundation, and policy of the rule *ex turpi causa non oritur actio.*

Every contract stipulating for the performance of an illegal act, or founded upon an illegal consideration, is rendered void by the power, and to conserve the policy, of the law; and this altogether independently of the will or wish of the parties concerned. An English judge declared, "*You shall not* stipulate for iniquity." Lord Mansfield said, that it is not for the sake of a *defendant* that the objection is ever allowed that a contract is immoral or illegal, but is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice of the case.‡

Mr. Durant (*who filed a brief for Messrs. Sullivan, Billings, and Hughes*), *contra:*

1. It is settled beyond controversy that two members of

* Bartle v. Coleman, 4 Peters, 187.

† The Reform, 3 Wallace, 632; The Sea Lion, 5 Id. 647; The Ouachita Cotton, 6 Id. 521.

‡ Tool Company v. Norris, 2 Wallace, 45; Craig v. Missouri, 4 Peters, 436.

Recapitulation, in the opinion, of the case.

the same community may make any transfer of personal property within the enemy's lines, not based upon, nor looking to communication with the enemy. Coppell, either as British consul or British subject, had then the right to enter into this contract. Communication with the enemy was negatived by the presumption of law, which presumes the protection to be legal when it was reasonably possible. In aid of this presumption it should be observed (as the fact was within common knowledge), that the military occupation of the region in which this cotton was situated frequently and rapidly changed, the Federal forces to-day advancing beyond, and in a short time falling back on the hither side of this region, and the Confederate forces receding and advancing correspondingly, so that communication with persons in charge of the cotton would be strictly lawful at one time, and the effect of that communication might be at another time to prevent the destruction of the cotton by the enemy's forces.

The restraints upon the defendant in error, as British subject or consul, were even less than those springing from his domicile, *i. e.*, viewed as a member of the community of New Orleans; for the announced attitude of his government, in the proclamation of Her Britannic Majesty, of May 31, 1861,* had not in the least added to the ordinary duties of neutrals, nor imposed any additional restraints upon her subjects.

2. The military general orders were the governing law of a region wholly occupied by military force, and were a sufficient permission for what was done.

3. The parties sued had, by their reconventional demand, taken the position of plaintiffs in the suit. *They* set up the contract, and claimed damages for its alleged violation. By taking that attitude they had waived their exception of illegality, and both parties alike stood upon the contract.†

Mr. Justice SWAYNE delivered the opinion of the court.

It appears from the record that this action was founded

* Lawrence's Wheaton's International Law, p. 698.

† 1 Story's Eq. Jurisprudence, § 296; Batty v. Chester, 5 Beavan, 103.

Recapitulation, in the opinion, of the case.

upon a contract entered into on the 14th of September, 1863, between Hall, one of the plaintiffs in error, and Coppell, the defendant in error. It was agreed that Hall should furnish Coppell 1169 bales of cotton,—789 bales at B. L. Mann's place, about one mile from Arcola station on the Jackson railroad, 47 bales at Gilman's, near Tangepahow, and the residue in the parish of St. Helena, East Feliciana, and in Williamson and Amity counties, Mississippi. Coppell agreed to cause the cotton to be "protected" and transported to New Orleans, and disposed of to the best advantage, paying to Hall the actual cost of the cotton and two-thirds of the net profits, "after deducting freights, taxes, &c.," without commissions, retaining one-third of the profits as his compensation. It was further agreed, that if any of the cotton should be stolen, burned, or otherwise destroyed, Hall should be exonerated to that extent; and that Coppell should pay Hall, or cause him to be paid at Arcola, sums approximating to the value of his interest, as the cotton was removed; such sums to be indorsed on the notes given by Coppell to Hall; one for $318,350.00, and the other for $57,000.00, both bearing even date with the contract.

Coppell was the plaintiff in the court below. His petition avers: That he is a subject of Great Britain, and a resident in that kingdom; That Hall, the plaintiff in error, resides in the city of New Orleans, and Mann, the other plaintiff in error, at Arcola station, in Louisiana; That Hall and Mann delivered to him 1189 bales of cotton, of which 789 bales were on the plantation of Mann, at Arcola, and the remainder at various other places mentioned in a schedule annexed to the petition; That he caused the 789 bales to be branded with his initials and his private mark; That he had appointed Mann his agent to take charge of the cotton in his name and for his benefit, and that Mann acted as his agent accordingly; That, by reason of the war, he was unable to bring the cotton to market, but that he had expended large sums and much time and labor in "protecting" it; That, at the time of entering into the contract, he executed the two notes mentioned, which were to be held by Hall as

Recapitulation, in the opinion, of the case.

security for the proceeds of the cotton, and that these notes were still in the possession of Hall; That he was then able and desirous to bring the cotton to New Orleans for sale, and had made a demand for it on Hall and Mann, but that they had neglected and refused to deliver it, to his damage in the sum of $50,000.

He subsequently filed an amended petition, in which he sets forth: That the contract between himself and Hall was entered into by the permission of the major general commanding the Department of the Gulf, expressed in general orders — Coppell being then engaged in business in New Orleans, and Hall living in that city; That the notes, mentioned in the contract, are held by Hall and Mann, or have been transferred by them to other parties; That, on the 14th of September, 1863, Mann sold and delivered to Hall 1169 bales of cotton, then on the plantation of Mann; and that Hall, in part execution of his contract, designated and transferred this cotton to Coppell; That Coppell "protected" the cotton, and that Mann continued to hold it in trust for him and Hall, until the Confederate armies, under the command of General Richard B. Taylor, surrendered to the forces of the United States, when Mann and Hall, colluding to defeat the trust, refused to allow Coppell to bring the cotton to New Orleans, according to the contract; That this cotton is the same which was sequestered in this suit, and that he is entitled to the possession of it.

The original and supplemental answers of Hall and Mann set up the following defences: That the cotton was situated in territory under the control of the rebel authorities, and that the contract was entered into there; that the object of the contract was the protection of the cotton, within the rebel lines, by Coppell, as the British consul, and its transportation to New Orleans during the war then raging; that the contract was thus in violation of the laws of the United States; of the neutral obligations of the plaintiff, as British consul and a resident of the United States; and of public policy; and was null and void; that the plaintiff lost all right and interest in the contract by leaving Louisiana before the

Recapitulation, in the opinion, of the case.

restoration of peace, and that the defendants were thereby released from all liability upon the contract; that, if the contract should be held valid, the defendants claimed damages, by way of reconvention, for breach of the contract by the plaintiff, in neglecting to remove the cotton to New Orleans, and to sell it as he had agreed to do.

In reply to the reconventional demand, the plaintiff replied that he was the consul of her British Majesty; that he did protect the cotton from all seizures which his agreement included; and that, as soon as the military situation permitted, he was ready and willing to perform all the stipulations of his agreement, and tendered the necessary means for the transportation of the cotton to New Orleans; which tender the defendants declined.

Upon this state of the pleadings the cause proceeded to trial. The parol evidence is not as fully set out as should have been done; but the controlling facts sufficiently appear.

The plaintiff gave in evidence the military orders of the department commander of the 7th of March and the 3d of September, 1863. By these orders the trade of the Mississippi, within the Department of the Gulf, was permitted, subject to such restrictions only as should be necessary to prevent the supply of provisions and munitions of war to the enemy. The products of the country were authorized to be brought to New Orleans, and other designated points within the military lines of the United States, and to be sold by the proprietors or their factors "for the legal currency of the United States, without restriction or confiscation." New Orleans was then in the military possession of the United States.

The cotton was all within the rebel lines. This state of things continued until the surrender of the rebel forces under General Taylor. Consular certificates were given by the plaintiff, each setting forth that the cotton therein referred to was "the property of a British subject."

In the progress of the trial numerous exceptions were taken by the defendants. Some of them relate to the rejection of testimony; the residue to instructions given or

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refused. The view which we take of the case renders it necessary to consider only those which relate to the legality of the contract. They are the 2d, 7th, 8th, and 9th. The 2d, 8th, and 9th, taken together, show that the court, in instructing the jury, substantially affirmed the following propositions:

That the demand for reconvention, set up by the defendants, "cured any nullity or illegality in the contract, if any existed, and that, under the pleadings, the plaintiff might recover, notwithstanding such illegality."

That the military orders, then in force, authorized and gave validity to the contract.

That Hall and the plaintiff both residing in New Orleans, the contract was valid under the law of nations.

It appears, by the 7th bill of exceptions, that the defendants prayed the court to instruct the jury, that if the cotton, referred to in the contract, was at the time of its sale situated in territory which was under the permanent control of the Confederate forces, the same was enemy property; and that if it was in the contemplation of the parties that the plaintiff, acting as British consul at New Orleans, or as a British subject resident in New Orleans, should extend British protection over said cotton, and should "issue his official certificates, as British consul, that the cotton was the property of a British subject, for the protection of the same within lines occupied by the enemy during the war; and that such protection formed a part of the consideration of the contract; then the contract was contrary to the laws of the United States, to the law of nations, to public policy, and to good morals, and that said contract was, therefore, null and void." The court refused to give this instruction. The reason assigned for the refusal was, "that the proof was that both parties were residents and domiciled in New Orleans; and that the court could not charge upon a supposed case which did not exist."

It does not appear to us that this objection to giving the instruction asked was well taken. Conceding the fact that the parties did both reside in New Orleans, the instructions

met exactly the exigencies of the case. If the defendants were right as to the legal views upon which they insisted, the instruction should have been given. If they were wrong in those views, it was properly refused. The point thus presented will be considered in connection with those arising upon the instructions which were given.

Consuls are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the exequatur which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state.* A trading consul, in all that concerns his trade, is liable in the same way as a native merchant.† The character of consul does not give any protection to that of merchant when they are united in the same person.‡

By the terms of the contract, Hall was to "furnish" the cotton to Coppell. It was all within the rebel lines, and was, therefore, enemy property. Coppell was to cause it to be "protected." If there could be any doubt about the meaning of this phrase as used in the contract, it is dispelled by the conduct of Coppell in issuing the consular certificates, that the cotton which they covered respectively was "the property of a British subject." He was to receive the cotton in the rebel territory, to make an advance upon it there, to transport it to New Orleans, and there to sell it for the benefit of the contracting parties. The contract was one of factorage. Aside from the question of illegality, it is clear that no title passed to Coppell. He was to have, and had no share in the acquisition of the cotton by Hall. His duties were to protect it; to receive it; to advance money upon it; to transport it; to sell it, and to account to Hall for his share of the proceeds.

* Dana's Wheaton, § 249; 1 Kent's Commentaries, 58.

† 2 Phillimore's International Law, ccli.

‡ The Indian Chief, 3 Robinson, 27; Arnold v. The U. S. Insurance Co., 1 Johnson's Cases, 363.

It was doubtless expected that the insurgent authorities and the insurgent population would respect the rights of the "British subject." If the surging tide of war should sweep back the rebel arms, and the national forces should penetrate to the localities of the cotton, the custodian would be ready, in every instance, to produce the consular certificate.

These certificates, even if issued in good faith, were nullities, and could give no immunity; yet it might well be hoped that the authorities of the United States, instead of seizing the cotton *jure belli*, and disposing of it according to the act relating to captured and abandoned property, would *ex gratia* waive their rights, and yield up the property to the ostensible British owner, whose claim was fortified by such a muniment of title. The parties intended to delude and defraud the United States. The means used were the certificates issued by the consul.

When the contract was entered into the rebellion had become a civil war of large proportions. Important belligerent rights were conceded to the insurgents by the government of the nation. The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy.* When international wars exist all commerce between the countries of the belligerents, unless permitted, is contrary to public policy, and all contracts growing out of such commerce are illegal. Such wars are regarded not as wars of the governments only, but of all the inhabitants of their respective countries. The sovereign may license trade, but in so far as it is done, it is a suspension of war, and a return to the condition of peace. It is said there cannot be, at the same time, war for arms and peace for commerce. The sanction of the sovereign is indispensable for trade. A state of war *ipso facto* forbids it. The government only can relax the rigor of the rule.†

During the late civil war the subject was regulated by

* The Prize Cases, 2 Black, 687; Mrs. Alexander's Cotton, 2 Wallace, 417; Mauran v. The Insurance Company, 6 Wallace, 1.

† Dana's Wheaton, § 316; 1 Kent's Commentaries, 68; The Hoop, 1 Robinson, 196.

Congress. The 5th section of the act of July 16th, 1861, authorized the President to proclaim any State, or part of a State, in a condition of insurrection, and it declared that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States should be unlawful so long as hostilities should continue, and that all goods and merchandise, coming from such territory into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, should be forfeited. It was enacted in a proviso that the President might permit commercial intercourse with any part of such territory "in such articles, and for such time, and by such persons" as he might deem proper, and that "such intercourse, so far as by him licensed," should be "carried on *only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.*"

On the 10th of August, 1861, the President issued a proclamation declaring the inhabitants of the rebel States—including Louisiana and Mississippi—in a state of insurrection. Certain local exceptions, not necessary to be stated, were made.

By a proclamation of the 31st of March, 1863, it was declared that the inhabitants of the same States, with certain local exceptions, of which New Orleans was one, were in a state of insurrection, and that all commercial intercourse, not licensed according to the act before mentioned, "between those States, the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States," was unlawful, and that all products, goods, and chattels coming from any of the insurrectionary States, "with the exceptions aforesaid," or proceeding to "any of said States, with the exceptions aforesaid, without the license and permission of the President through the Secretary of the Treasury, would, together with the vessel or vehicle conveying the same, be forfeited to the United States."

By a circular from the Treasury Department of the 3d of July, 1863, it was declared to be the purpose of the department: "3d, to allow no intercourse at all beyond the na-

tional and within the rebel lines of military occupation; across these lines there can be no intercourse, except that of a character exclusively military."

Amongst the treasury regulations framed under the act of 1861, in force when the contract was entered into, was the following:

"VII. Commercial intercourse with localities beyond the lines of military occupation by the United States forces, is strictly prohibited; and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States."

The military orders set forth in the record were unwarranted and void. The President alone could license trade with the rebel territory, and when thus licensed, it could be carried on only in conformity to regulations prescribed by the Secretary of the Treasury. The subject was wholly beyond the sphere of the power and duties of the military authorities.* These orders may be laid out of view. They can in no wise affect the case.

The stipulations in the contract as to everything Coppell was to do in the rebel territory was contrary to public policy, to the law of nations, to the act of Congress, to the proclamation of the President, and to the regulations of the Treasury Department.

The protection to be given, if effectual, might have deprived the United States of pecuniary means to the extent of the value of the cotton. Withholding from one scale affects the result as much as putting into the other. The objection rests upon the same principle as insuring enemy property. This is condemned by all publicists who have written upon the subject, including as well the earliest as the latest. Valin,† Emerigon,‡ and Bynkershock,§ are no less emphatic than Wheaton‖ and Phillimore.¶ Such, also, is the rule of

* The Reform, 3 Wallace, 632; The Sea Lion, 5 Id. 647; Ouachita Cotton, 6 Id. 521.

† Liv. 3, tit. 6, art. 3.

‡ Vol. 1, 128.

§ 2 Jurisprudentiæ Pub., ch. 21

‖ Dana's Wheaton, § 317.

¶ Vol. 3, 109.

the common law.* Such contracts are not only illegal and void, but repugnant to every principle of public policy. The law will not permit the citizen, in the perils of war, to subject himself to such a temptation to swerve from his duty to his country. In *Bell* v. *Potts* it was held to be illegal for a British subject, in time of war, without a license, to bring, even in a neutral ship from an enemy's port, goods purchased by his agent resident in the enemy's country, after the commencement of hostilities. In *Antoine* v. *Morshead*† an alien in an enemy's country during war, drew a bill on a British subject, resident in England, and, after peace, sued for the amount of the bill. The same rule was reluctantly applied by Chief Justice Gibbs. It was held that the plaintiff could not recover. If the course of the transaction had been reversed, the result would have been the same. The same rule would have been applied in the British courts.

The payment of money by a subject of one of the belligerents, in the country of another, is condemned, and all contracts and securities looking to that end are illegal and void.‡

The adjudications of this court have always proceeded upon the same principles.

In the case of *Brown* v. *The United States*, Mr. Justice Story said that "no principle was better settled than that all contracts made with an enemy during war were utterly void."

In the case of *The Rapid*,§ the facts were, that an American citizen bought English goods in England before the war, and deposited them on an island belonging to the English, near the province of Maine. Upon the breaking out of the war he sent the Rapid from Boston to the island to bring away the goods. Upon her return she was captured by an American privateer. The goods were condemned as lawful prize. It was held that the vessel, while thus engaged, was

* Brandon v. Nesbitt, 6 Term, 28; Potts v. Bell, 8 Id. 548; Furtado v. Rogers, 3 Bosanquet & Pull. 191.

† 6 Taunton, 237.

‡ Griswold v. Waddington, 16 Johnson, 459, 460.

§ 8 Cranch, 155

trading with the enemy, and that the goods had acquired the character of enemy's property. Mr. Justice Story, in delivering his opinion in the court below, said: "That not only all trading, in its ordinary acceptation, but all communication and intercourse with the enemy were prohibited. That it was in no wise important whether the property engaged in the inimical communication be bought or sold, or merely transported and shipped. That the contamination of forfeiture was consummate the moment the property became the object of illegal intercourse."

In the case of *The Julia*,* the vessel was condemned only because, on sailing from Baltimore to Lisbon, and returning, she had carried a license from a British admiral, issued within our territory by a British agent.

In *Griswold* v. *Waddington*, Kent, C. J., said: "The law had put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and to prolong the calamities of war."

The instruction given to the jury, that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for

* 8 Cranch, 181.

the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.*

The court below erred in refusing to instruct as prayed, and in the instructions given.

The judgment below is REVERSED, and the cause will be remanded to the Circuit Court, with directions to issue a

VENIRE DE NOVO.

COCKS v. IZARD.

A bill in equity, by the owner of real estate, sold at public judicial sale, will lie against a person who, at such sale, has made untrue representations, which prevent other persons from bidding, and by which he has so, himself, got the property at an undervalue. The original owner is not confined to seeking relief through the summary modes, such as motion to set aside the sale, which it was within the power of the court from which the execution issued, to grant. *Slater* v. *Maxwell* (6 Wallace, 276), affirmed.

APPEAL from the Circuit Court of Louisiana.

During the late rebellion, one Anderson, by a proceeding in what was known as "the Provisional Court of Louisiana" —a court established by proclamation of the President, in October, 1862, when the insurrection which had prevailed in Louisiana, had temporarily subverted and swept away the judicial authorities of the Union, and which, by the terms of its constitution, was to last only until "the restoration of the civil authority"—brought some sort of suit against one Cocks.

The suit proceeded to execution; and, on execution, the marshal of the said Provisional Court exposed to public sale certain real estate owned by Cocks, in New Orleans, and worth $15,000. Cocks was a resident of Mississippi,

* Morck v. Abel, 3 Bosanquet & Puller, 35; Armstrong v. Toler, 11 Wheaton, 258; Collins v. Blantern, 1 Smith's Leading Cases, 630, and notes.

and knew nothing of the suit, execution, or exposure to sale. At the sale, one Izard, his tenant, who was there, made a bid of $1500, giving out, and letting it be understood, that he was bidding for account of Cocks, and in his interest. Persons, who were at the sale, thus refrained from bidding, from a wish not to compete; and, competition being so prevented, the property was knocked down to Izard at the sum bid by him.

Izard acknowledged these facts soon after the sale, and promised to reconvey on receiving the money which he had advanced. He afterwards refused to do this.

Cocks now filed a bill in the court below, setting forth the above facts, that Izard had received in rents, in two years, $2500; and praying an account and reconveyance.

Izard demurred, and the court below, sustaining the demurrer, dismissed the bill. Cocks appealed.

Mr. Conway Robinson, for the appellant, asked a reversal of the decree on these two principal grounds:

1st. That the court which rendered the judgment against Izard and issued the execution, was not a court competent to exercise judicial power, consistently with the Constitution of the United States.

2d. That conceding that the court had jurisdiction, the proceedings at the sale were, nevertheless, of such a character as to demand the interposition of a court of equity.

Mr. P. Phillips, contra, contended that the "Provisional Court," having been established while war was flagrant, and while the place was in military occupation, was founded on necessity, and being to last only while the necessity lasted, had sufficient jurisdiction. That the mere declaration of one person, that he intended to buy for another person, without evidence of any previous agreement to do so, or of any advance of money for that purpose, raised no trust which could be supported in equity.*

* Lloyd v. Lynch, 28 Pennsylvania State, 423; Pattison v. Horn, 1 Grant, 303.

That, independently of this, Cocks ought to have applied to the Provisional Court, to set the sale aside and order a resale.

Mr. Justice DAVIS delivered the opinion of the court.

It was decided by this court, in *Slater* v. *Maxwell*,* that where a judicial sale is impeached for fraud, or unfair practices, of officer or purchaser, to the prejudice of the owner, a court of chancery is the proper tribunal to afford relief, and this decision only reaffirmed a well-established doctrine of equity jurisprudence. The present case is within this rule, and the court below manifestly erred in sustaining a demurrer to the bill.

The complainant puts his case for relief on two principal grounds. The necessities of this case do not require us to examine and decide the first point thus raised by him; for the second, if the averments of the bill are true, affords ample ground to give the complainant the desired relief.

The bill charges that Cocks, a citizen of the State of Mississippi, was the owner of a valuable dwelling-house and lots in the city of New Orleans, occupied by Izard, as his tenant, which were seized on judicial process, and ordered to be sold. It does not appear in what way the court acquired jurisdiction of the case, but, it is fair to presume, it was through a proceeding by attachment, as the complainant avers he was without the State, and did not know of either the judgment, execution, levy, or sale.

In this condition of things, the sale took place, and Izard bought the property for a sum of money hardly equal to its yearly rental value. This he was enabled to accomplish by unfair practices, which operated to prevent persons, who were in attendance at the sale and desirous of purchasing, from bidding.

These practices were of a character well calculated to deceive, for it is easy to see that fair-minded men, knowing the owner of the property to be absent, would be inclined

* 6 Wallace, 276.

to put faith in the declarations of his tenant, that if he purchased, it was on account of his landlord, whose interests he wished to protect, and would be disinclined to interfere with the arrangement.

Can it, then, be doubted, if these things are true, that the conduct of the defendant deprived the complainant of the advantage which he would have received from a fair sale of his property, at which there would have been competition among persons, both able and willing to buy?

The law will not tolerate any influences likely to prevent competition at a judicial sale, and it accords to every debtor the chance for a fair sale and full price; and if he fails to get these, in consequence of the wrongful interference of another party, who has purchased his property, at a price greatly disproportioned to its value, equity will step in and afford redress, either by setting aside the proceedings under the sale, or by holding the purchaser to account.

The defendant in this case has behaved badly, and cannot be allowed to enjoy the fruits of his unfair dealing. The complainant had a right to expect, after reposing enough confidence in him to rent him a dwelling-house, that he would not, in his absence, turn against him, and use this very relation to his prejudice. It may be that, at the time of his purchase, the defendant intended to carry out his promises, for, after the sale, he admitted his obligation to do so, but his cupidity, in the end, got the better of him, as he now asserts an adverse title in himself.

It is insisted, that the complainant should have availed himself of the summary mode, by petition or motion to the court, to have had the sale set aside, and resale ordered; but this objection cannot prevail. It is needless to inquire whether he could have obtained his object in this way, as by not pursuing it, he did not forfeit his right to sue in equity, and the defendant has surely no right to complain, for he has now ample opportunity to make defence and vindicate his integrity.

The decree of the Circuit Court of the United States for

the District of Louisiana is REVERSED, and the cause is remanded to that court, with directions to proceed

IN CONFORMITY WITH THIS OPINION.

THE GRAPESHOT.

1. Proof that papers, not contained in the record, were used in the court below, must be made by affidavit, not by certificate of the clerk.
2. A decree of the Provisional Court of Louisiana, which was established by order of the President, during the rebellion, having been transferred into the Circuit Court, in pursuance of an act of Congress, must be regarded, in respect to appeal, as a decree of the Circuit Court.

UPON two separate motions to dismiss an appeal from the decree of the Circuit Court of the United States for the District of Louisiana; the decree being one transferred there under act of Congress, from the late so-called "Provisional Court" of that State; both motions being made by *Mr. Durant.*

The ground of the first motion was because the transcript was incomplete, "*as appeared by the certificate of the clerk* of the lower court, as given in the printed transcript, and because it further appeared *by the said certificate*, that the missing parts of the record could not be found, so that it was useless to issue a *certiorari*," and on the whole impossible for this court to hear and decide the case.

The ground of the second motion was, that the Circuit Court of the United States in Louisiana had rendered no decree from which an appeal could be taken; so that this court was without jurisdiction.

This Provisional Court of Louisiana, as mentioned in the preceding case, had been established by proclamation of the President, in October, 1862, when the war of the rebellion had subverted and swept away the courts of the Union, and, by the terms of its constitution, was to last no longer than till the civil authority was restored.

Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

The first motion to dismiss this appeal is made upon the ground that the transcript of the record is incomplete, because of the omission of certain papers said to have been used in the court below, but not to be found when the transcript was made.

The motion must be denied. Proof that the papers alleged to be wanting were used in the court below, and have been lost, must be made by affidavit. The certificate of the clerk who made the transcript cannot be received as proper evidence of these facts.

The other motion is made upon the ground that the decree below was rendered by the Provisional Court of Louisiana, established by the military authority of the President, during the late rebellion, from which no appeal could be properly taken. But we find, on looking into the statutes, that when the Provisional Court ceased to exist, its judgments and decrees were directed to be transferred into the Circuit Court, and to stand as the judgments and decrees of that court. And it is from the decree of the Circuit Court that the appeal under consideration was taken. As an appeal from that court it was regular, and the motion to dismiss must be denied.

All questions concerning the validity of judgments and decrees of the Provisional Court will remain open until after final hearing. MOTIONS DENIED.

GENERES v. BONNEMER.

A judgment affirmed in a case where the only ruling of the court, to be found in the record, was a judgment rendered in favor of a plaintiff for the recovery of a sum of money; where there was no question raised in the pleadings, no bill of exceptions, and no instructions or ruling of the court; and where what purported to be a statement of facts, signed by the judge, was filed more than two months after the writ of error was allowed and filed in the court, and nearly a month after the citation was issued.

IN this case, which came on error to the Circuit Court for Louisiana, it appeared that the only ruling of the court, to

Syllabus.

be found in the record, was a judgment rendered in favor of plaintiff for the recovery of a sum of money. There was no question raised on the pleadings; no bill of exceptions; no instructions or ruling of the court.

There was what purported to be a statement of facts, signed by the judge, found in the record. It was filed more than two months after the writ of error was allowed and filed in the court, and nearly a month after the citation was issued by the judge. It did not appear to have been filed by consent of parties.

The case was submitted by *Mr. Janin for the plaintiff in error, and by Mr. Durant, contra,* pointing out the peculiarity of the record.

Mr. Justice MILLER delivered the opinion of the court.

To permit the judge to make a statement of facts, on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the judge, without hearing and without remedy. The statement of facts, filed without consent of the parties, must be treated as a nullity; and, as there is nothing on which error of the court below can be predicated, the judgment must be

AFFIRMED.

LABER v. COOPER.

1. The fact that no replication is put in to two of three special pleas, raising distinct defences, is not a matter for reversal; the case having been tried below as if the pleadings had been perfect and in form.
2. Nor, that such pleas have concluded to the court instead of to the country; the matter not having been brought in any way to the attention of the court below.
3. Nor, under similar omission, that the language of the verdict in such a case is, that we find the "issue," &c., instead of the "issues."
4. The fact, that testimony was objected to and received, does not oblige this

court to consider it; the record not showing that the objection was overruled, and exception taken.

5. It is not error to refuse to give instructions asked for, even if correct in point of law, provided those given cover the entire case, and submit it properly to the jury.

6. The overruling of a motion for a new trial cannot be made the subject of review by this court.

ERROR to the Circuit Court for the Northern District of Illinois.

Cooper sued Laber in the court below. His declaration contained two counts upon a promissory note, made by Laber to a certain railroad company, or its order, and indorsed, as was alleged, to the plaintiff. It contained also the common counts.

The defendant pleaded the general issue, and three special pleas.

The first averred that there was no consideration for the note, and that it was obtained from the defendant by fraudulent misrepresentations; and that these facts were known to the plaintiff when he took it.

The second denied the indorsement of the note, as averred in the first count.

The third was to the same effect, as to the indorsement averred in the second count.

All the special pleas, though thus denying only what the plaintiff alleged, and not containing either new matter or a special traverse, concluded with a *verification;* and not to the country.

To the first of them the plaintiff replied, denying his alleged knowledge of fraudulent misrepresentations. To the second and third, no replications were filed. With the pleadings in this state, the case went to trial, and was tried as if the pleadings had been in form and perfect.

Among the testimony given by the defendant relating to both the allegation of fraudulent misrepresentation and to the matter of indorsement, was that of one Durand. The admission of part of this (not necessary to be stated, in view of the decision of this court, that it was not properly

brought before it), was objected to by the defendant; but it was, nevertheless, admitted; and this was all that the bill of exceptions disclosed about the matter. No exception to it appeared on the bill.

A request for certain specific instructions, as the record showed, was made by the defendant. The court refused to give them, but charged the jury clearly upon the whole case; fully presenting in the charge its views upon both the subjects presented by the special pleas, and which were, in fact, the only grounds of the controversy. It is not necessary for the reporter to state the case at large on which the charge was given, nor the instructions asked, nor the charge itself; this court considering* that the report would shed no new light on any legal principle.

The language of the verdict was thus:

"We, the jury, find the *issue* for the plaintiff, and assess his damages to the sum of $7192."

A motion for a new trial was made, and overruled, and judgment entered upon the verdict.

The defendant excepted to the refusal to charge as prayed, to different passages in the charge as given, and to the overruling of his motion for a new trial.

The record contained a hundred and seventy-five pages, of which more than four-sevenths was taken up by the bill of exceptions.

Mr. Carpenter, for the plaintiff in error, contended:

1. That the court had manifestly proceeded in the trial as though all the facts set forth in the defendant's *three special pleas* were put in issue, while no replication had been put in to the two pleas, denying the indorsement.

2. That even assuming that these matters were all in issue, the verdict did not cover them; being only upon the issue, some one issue; but upon what one did not appear.

3. That Durand's testimony was inadmissible.

* See *infra*, p. 571.

Recapitulation of the case in the opinion.

4. That the court, instead of charging upon the instructions asked, and so upon points, charged upon general principles; thus not presenting the matters in issue in the best way for the jury to understand them.

[The learned counsel then analyzed the charge, endeavoring to show its error.]

Mr. Umlauf, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

In this case the bill of exceptions furnishes the same ground of complaint, which was remarked upon in *Lincoln* v. *Claflin*,* heretofore decided at this term. In the case before us, it fills an hundred and twenty-seven printed pages. The points arising for our consideration could have been better presented in a very small part of this space. Such a mass of unnecessary matter has a tendency to involve what is really important in obscurity and confusion. Its presence is a violation of the fourth rule of this court. Its examination consumes our time, increases our labor, and can subserve no useful purpose. The subject was so fully considered in the case referred to, that we deem it unnecessary to pursue it further upon this occasion.

Winnowing away the chaff, we find the questions left for our examination neither numerous nor difficult of solution.

The declaration contains two counts upon a promissory note, made by Laber to the Racine and Milwaukee Railroad Company, or order, for $3700, dated the 6th of May, 1856, payable five years from the 10th of May, in that year, with interest at the rate of ten per cent. per annum, payable annually, on the 10th of May; principal and interest payable at the office of the company, in the city of Racine, in the State of Wisconsin, and indorsed by the payee, by H. S. Durand, its president, to the plaintiff. The declaration contains also the common counts.

The defendant pleaded the general issue, and three special pleas.

* *Supra*, p. 132.

The first special plea avers that the note, and a mortgage securing its payment, were given to the railroad company for thirty-seven shares of its capital stock; that there was no consideration for the note; that it was obtained from the defendant by false and fraudulent representations; and that these facts were known to the plaintiff when the note came into his possession. The second special plea denies the indorsement of the note to the plaintiff, as averred in the first count. The third special plea is to the same effect, as to the indorsement averred in the second count. All the special pleas conclude with a verification.

To the first of the special pleas, the plaintiff replied denying knowledge of the alleged false and fraudulent representations, before and at the time of the indorsement and transfer of the note. To the second and third special pleas, no replications were filed.

The cause proceeded to trial. The record shows that a large mass of testimony was given by the defendant relating to both the defences set up by the special pleas. A prayer for instructions was submitted by the defendant. The court refused to give them, but charged the jury fully upon the whole case. Both the subjects presented by the special pleas were fully discussed. Indeed they were the only grounds of the controversy between the parties. The case was tried, in all respects, as if the pleadings had been formal and perfect. The jury found for the plaintiff. The language of the verdict is: "We, the jury, find the *issue* for the plaintiff, and assess his damages," &c. The defendant moved for a new trial. The motion was overruled, and judgment entered upon the verdict. The defendant excepted to the refusal to charge as prayed, to twelve passages in the charge as given, and to the overruling of his motion for a new trial.

1. It is objected, as an error, that no replication was put in to the pleas denying the indorsement of the note.

The plea of the general issue would have made it incumbent upon the plaintiff to prove the indorsement as averred in the declaration, but that the statute of Illinois, adopted

by the Circuit Court as a rule of practice, dispenses with such proof, unless the fact is denied by the defendant under oath. The oath of the defendant was affixed to both the pleas, raising the question. As they only denied what the plaintiff had alleged, contained no new matter, and no special traverse, they should have concluded to the country, and not to the court. The defect was one of form, and could have been reached by a special demurrer. The trial proceeded as if they had concluded to the country, and a similiter had been added by the plaintiff. To the objection now taken, there are several answers. The irregularity is cured by the trial and verdict.* The objection comes too late; not having been made in the court below, it cannot be made here. It is within the thirty-second section of the Judiciary Act of 1789, which forbids a judgment to be reversed for any want of form in the proceedings, except such as shall have been specially pointed out by demurrer.

2. It is said that, conceding the issues intended to be made by the defendant were in fact submitted to the jury, the verdict does not respond to them; that it finds "the issue"—but one—and not designating which one, for the plaintiff.

It was competent for the court to amend the verdict by changing the term "issue" from the singular to the plural. This would have removed the ground of the objection. A verdict, unless it be a special one, is always amendable by the notes of the judge.† The proper amendment would doubtless have been made below, if the attention of the court had been called to the subject. Like the preceding objection, it is made here too late, and is within the act of Congress referred to, upon the subject of jeofails.

3. Upon looking through the testimony of Durand, as set out in the bill of exceptions, it appears that the admission

* Coan v. Whitmore, 12 Johnson, 353; Brazzel & Hawkins v. Usher, Breese, 14; Stone v. Van Curler, 2 Vermont, 115; Sullivan v. Dollins, 18 Illinois, 88; Coutch et al. v. Barton, 1 Morris, 354.

† 1 Chitty's Pleading, 411; Roulain v. McDowall, 1 Bay, 490; Norris v. Durham, 9 Cowen, 151; Sayre v. Jewett, 12 Wendell, 135; Paul v. Hardcn, 9 Sergeant & Rawle, 23.

of a part of it was objected to by the defendant, but it does not appear that the objection was overruled, and exception taken. It only appears that the testimony was admitted after the objection was made. *Non constat*, but that the objection was waived, or the decision acquiesced in. In order to make such a point available, it is necessary that an exception should be distinctly taken, and placed upon the record.

4. It was not error for the court to refuse to give the instructions asked for by the defendant, even if correct in point of law, provided those given covered the entire case, and submitted it properly to the jury. The defences of false and fraudulent representations to the defendant, and of the non-indorsement of the note, involved mixed questions of law and fact. We think the law was properly stated by the judge, and the facts fairly submitted to the jury. The charge was full and able. It would throw no new light upon any legal principle, and could be productive of no benefit, to examine in detail, each of the numerous passages taken from the charge, and made the subject of exception. It is sufficient to say that, after a careful examination of all of them, in the light of the context of the charge, and of the evidence, as it was before the jury, we have found nothing which we deem erroneous.

5. An exception to the overruling of the motion for a new trial is found in the record, but is not adverted to in the argument submitted for the plaintiff in error. Such a decision cannot be made the subject of review by this court.

The judgment below is

AFFIRMED.

THE ALICIA.

1. This court cannot acquire jurisdiction of a cause through an order of a Circuit Court directing its transfer to this court, though such transfer be authorized by the express provision of an act of Congress. Such provision must be regarded as an attempt, inadvertently made, to give to this court a jurisdiction withheld by the Constitution.

2. In such a case, a notice to docket and dismiss, must be denied, and this court will certify its opinion to the Circuit Court, for information, in order that it may proceed with the trial of the cause.

THIS was a motion by *Mr. Ashton, Assistant Attorney-General*, to docket and dismiss.

It appeared from the certificate of the clerk of the Circuit Court of the United States for the Southern District of Florida, that on the 9th of January, 1863, a decree of condemnation was entered in the District Court for the condemnation of the Alicia and her cargo, for violation of the blockade. From this decree an appeal was allowed, and taken to the Circuit Court; and, on the 18th of May, 1867, an order was made in that court, on the application of the parties in interest—there being at this time, in the Circuit Court, no order, judgment, or decree in the case—for the transfer of the cause to this court.

The application and order for transfer were made under the thirteenth section of the act of June 30, 1864,* which enacts that prize causes, depending in the *Circuit* Courts, may be transferred, upon the application of all parties in interest, to *this* court.

The appellant had not docketed the cause and filed the record within the time allowed by the rules in cases of appeals, and Mr. Ashton's motion to dismiss was made for that reason.

The CHIEF JUSTICE delivered the opinion of the court.

As the appellant has not docketed the cause and filed the record within the time allowed by the rules in cases of appeals, the motion would be allowed as of course, if the appeal could be regarded as taken to this court from the decree of the District Court. But the decree of condemnation in that court was rendered in January, 1863, and the appeal to the Circuit Court was allowed, and bond given, in the same month. By these proceedings, and the transmission of the record to the Circuit Court, the cause was duly removed to

* 18 Stat. at Large, 311.

that court under the laws regulating appeals at that time. Subsequently, by the thirteenth section of the act of June 30, 1864, provision was made for appeals in prize cases directly from the District Court to this court; and it was directed that appeals from the Circuit Courts, in cases remaining therein, should be allowed to this court in the same manner as appeals from the District Court under the act. But it was also provided in the same section that prize causes, depending in the Circuit Courts, might be transferred, upon the application of all parties in interest, to this court; and it was under this provision that the application and order for transfer were made.

Can this court acquire jurisdiction of the cause through this order of transfer?

It cannot be doubted that the cause was removed to the Circuit Court by the appeal from the decree of the District Court in 1863. That decree was vacated by the appeal, and the Circuit Court acquired full jurisdiction of the cause. It might, in its discretion, make orders for further proof, and was fully authorized to proceed to final hearing and decree, in all respects, as if the cause had been originally instituted in that court. Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken. But in this case there had been no such order, judgment, or decree in the Circuit Court; and there was no subsisting decree in the District Court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution, and, consequently, that the order of transfer was without effect. The cause is still depending in the Circuit Court. We must decline, therefore, to make an order to docket and dismiss the appeal; but this opinion may be

CERTIFIED TO THAT COURT FOR INFORMATION.

RAILROAD COMPANY *v.* HARRIS.

To make a writ of error operate as a supersedeas, it is indispensable that the requirements of the act of Congress be strictly fulfilled. It is not enough that the writ be issued and served, but a copy of the writ must be lodged, for the adverse party, within ten days, Sundays exclusive, after judgment or decree.

THIS was a motion for writs of supersedeas to the Supreme Court of the District of Columbia to stay execution upon two judgments recovered in that court, one by Harris, against the Baltimore and Ohio Railroad Company, and the other by his administratrix, against the same defendant.

The first judgment was for injuries sustained by Harris, when a passenger on the defendant's railroad. The second was a judgment upon *scire facias*, to revive the former judgment, abated by the death of Harris, and to make his administratrix party to that judgment, and to have execution.

To bring the first judgment into this court for review, a writ of error had been sued out by the railroad company, and a sufficient bond for prosecution was filed, within ten days after rendition; but *no copy* of the writ of error appeared to have been lodged in the clerk's office for the use of the defendant in error.

The twenty-third section of the Judiciary Act thus declares:*

"A writ of error shall be a supersedeas, and a stay of execution, in cases only where the writ of error is served by a copy thereof being lodged, for the adverse party, in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment and passing the decree complained of."

Messrs. Bradley and Buchanan, in support of the motion.

Messrs. Davidge and Fuller, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The right of the plaintiff in error to the writs for which

* 1 Stat. at Large, 84.

Statement of the case.

the motion now before us is made, depends on the question whether, by the proceedings taken in the case, the writ of error upon the first judgment became a supersedeas?

And this question is answered by the express words of the twenty-third section of the Judiciary Act.

The legislature has seen fit to make the lodging of a copy of the writ, within ten days, a prerequisite to the operation of the writ as a supersedeas. The cause was removed from the inferior court to this court, by the issuing of the writ, and the due service of it upon the court to which it is addressed; but its additional effect, as a supersedeas, depends upon compliance with the conditions imposed by the act. We cannot dispense with that compliance in respect to lodging a copy for the adverse party.

The motion for writs of supersedeas in both cases must, therefore, be DENIED; and as the second writ of error brings nothing before us, unless the writ in the first case operated as a supersedeas under the statute, that writ must be

DISMISSED.

RAILROAD COMPANY *v.* BRADLEYS.

1. A decree ordering an injunction, previously granted to restrain a sale under a deed of trust, to be dissolved, *and directing a sale according to the deed of trust, and the bringing of the proceeds into court*, held to be a final decree.
2. An actual allowance of an appeal may be inferred where the record shows that an appeal was prayed for in open court, and an appeal bond filed and approved by one of the judges.
3. A supersedeas granted, the record showing that a decree dissolving an injunction was made on the 6th of February, a petition for the suspension of the order filed by one party on the same day, by another on the 15th, a petition to open the decree on the 18th; a motion to rescind, made on the 6th March, during the term at which the decree was rendered, which motion was heard and denied on the 18th, with an appeal prayed in open court on the 20th, and an appeal bond filed on the 23d.

MOTIONS to dismiss and for supersedeas, on an appeal from the Supreme Court of the District of Columbia. The case was thus:

Statement of the case.

The Washington, Georgetown, and Alexandria Railroad Company had filed, in 1863, a bill to enjoin the City of Washington and J. and A. Bradley, trustees, from making sale of certain property conveyed by the company in mortgage to the said Bradleys as trustees, and under which the Bradleys were about to sell the property to pay the mortgage debt. An injunction was accordingly granted. But after various proceedings on both sides, a decree was entered, on the 6th of February, 1869, which ordered that the injunction be dissolved, and *directed a sale by the Bradleys, the trustees of the property in controversy, according to the deed of trust, and the bringing of the proceeds into court to abide further orders.*

From this decree an appeal was prayed in open court by the railroad company, and subsequently an appeal bond was filed in the court, and approved by one of the judges. But it did not appear *directly* that an appeal was allowed.

As already stated, the decree dissolving the injunction and directing a sale, was entered on the 6th of February, 1869. A petition for the suspension of this order of dissolution was filed, by the secretary of the railroad company, on the same day; a motion to the same effect was made in behalf of the Department of War, on the 15th of February, and a petition to open the decree was filed on the 13th of February, by one of the stockholders of the company.

On the 6th of March, and during the term at which the decree was rendered, a motion to rescind was made in behalf of the railroad company, and on the 13th of that month was heard and denied.

On the 20th the appeal was prayed by the railroad company, and on the 23d the bond of appeal was approved and filed.

Upon this state of facts two motions were now made in this court,—one, in behalf of the appellees, to dismiss the cause for want of jurisdiction; the other, in behalf of the appellants, for a supersedeas.

In support of the motion to dismiss, it was urged,

First, that the decree appealed from was not final; and,

Secondly, that there was no allowance of appeal.

Opinion of the court.

In support of the motion for supersedeas, that the appeal bond was approved, and filed within ten days after the decree.

Messrs. Riddle and Brent, for the appellants.

Mr. J. H. Bradley, contra.

The CHIEF JUSTICE delivered the opinion of the court.

We think that the decree entered on the 6th of February, 1869, was a final decree within the principles of the case of *Thomson* v. *Dean*,* decided at this term, though it might have been otherwise had the decree been limited to the dissolution of the injunction, thereby merely permitting the trustees to sell under their trust.

The first ground of the motion to dismiss, therefore, cannot be sustained.

Nor is the second ground more tenable. It is true that it does not appear upon the record directly that there was an allowance of the appeal; but an appeal was prayed, and subsequently the appeal bond was filed in the court, and approved by one of the judges; and, we think, it may be properly inferred, from these facts, that an appeal was actually allowed. The motion to dismiss, therefore, must be denied.

In support of the motion for supersedeas, it was argued that the appeal bond was approved, and filed within ten days after the decree.

The decree was entered on the 6th of February, 1869. A petition for the suspension of the order of dissolution was filed, by the secretary of the complainants, on the same day; a motion to the same effect was made in behalf of the Department of War, on the 15th of February; and a petition to open the decree was filed on the 13th of February, by one of the stockholders of the company.

We do not think it necessary to consider the effect of either of these proceedings; for, on the 6th of March, and, as we understand, during the term at which the decree was

* *Supra*, p. 342.

rendered, a motion to rescind was made in behalf of the complainants, and was heard and decided.

There is no doubt that, during the term, the decree was, at all times, subject to be rescinded or modified, upon motion, and could not, therefore, be regarded as absolutely final, until the end of the term. It became final, in this case, when the motion to rescind had been heard and denied. This took place on the 13th of March, and, on the 20th, the appeal was prayed in open court, and on the 23d the bond of appeal was approved and filed.

We think this was in time, and the motion for supersedeas must, therefore, be allowed.*

ORDERS ACCORDINGLY.

MORRIS AND JOHNSON v. UNITED STATES.

1. An information under the acts of August 6th, 1861, and July 17th, 1862, which presents only a case of the unlawful conversion of property to the use of the persons proceeded against, cannot be sustained.
2. Neither the act of 1861, nor the act of 1862, contemplates any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.

APPEAL from the District Court for the Middle District of Alabama.

By an act of Congress of August 6th, 1861, property used in aid of the rebellion was made the lawful subject of *prize and capture* wherever found; and it was made the duty of the President of the United States to cause the same to be *seized*, confiscated, and condemned. And a subsequent act, that of 17th July, 1862, authorized the *seizure* and confiscation of the property of certain persons engaged in the rebellion.

These statutes being in force, an information was exhibited in this case in the court below, alleging, in substance, that certain bales of cotton had become the property of the

* Brockett v. Brockett, 2 Howard, 240.

United States through the surrender of the Confederate General Taylor, on the 5th of May, 1865, or otherwise had become liable to seizure and condemnation under the acts of Congress just mentioned; that this cotton was stored, until some day in April not specified, in the warehouse of the defendant, Johnson; and on some day, not specified, in the year 1865, was removed by him and the defendant, Morris, from the warehouse and sold; and that the said defendants had appropriated the proceeds to their own use. The information did not allege that the cotton was at the time, or had ever been, in any place where it could be seized, or that any proceeds of the sale existed in any such form as to be capable of seizure.

The defendants answered, setting up various matters of defence, and filed with their answer several exceptions to the information, of which two only, as this court considered, required notice.

The first was, that the information did not show any valid and subsisting seizure at the time of filing the information.

The second was, that the information did not allege any seizure under the acts of Congress.

These exceptions were overruled by the District Court, which proceeded to render a personal judgment against the defendants for the value of the cotton, as found by the court. From this decree the defendants appealed.

Mr. Chilton, for the appellants.

Mr. Ashton, Assistant Attorney-General, contra.

The CHIEF JUSTICE delivered the opinion of the court.

In proceeding to render a personal judgment against the defendants, for the value of the cotton, as found by it, the District Court erred.

Without adverting to the principles settled in the cases of the *Union Insurance Company* v. *United States*,* and *Armstrong's Foundry*,† we are clearly of opinion—first, that the

* 6 Wallace, 763. † Ib. 769.

information, at most, presents only a case of the unlawful conversion of property to the use of the appellants, and that for redress of such an injury this proceeding by information cannot be sustained; and second, that neither the act of 1861 nor the act of 1862 contemplated any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.

The decree of the District Court must therefore be REVERSED, and the cause remanded, with directions to the District Court to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree.

UNITED STATES v. ROSENBURGH.

This court cannot take cognizance, under the Judiciary Act of 1802, of a division of opinion between the judges of the Circuit Court, upon a *motion to quash an indictment.*

ON certificate of division in opinion between the judges of the Circuit Court for the Southern District of New York.

The Judiciary Act of 1802 provides that whenever any question shall occur before a Circuit Court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen, may be certified to this court, and shall by it be finally decided.

With this statute in force, one Rosenburgh was indicted in the court below, for an offence alleged to be within an act of Congress specified. *A motion being made to quash the indictment*, on the ground, among others, that upon the true interpretation of the act under which the indictment was made, no offence had been committed, and that the indictment was insufficient, a division of opinion on these points existed between the judges, involving, of course, a division as to whether the motion to quash ought or ought not to be granted.

The division upon the meaning of the act, and upon the sufficiency of the indictment, being certified, these points were argued. But it appearing, also, that they arose upon a motion to quash, a preliminary question—one, as the result proved, which rendered the decision of the other questions unnecessary—was suggested here; the question, namely, whether this court could, under the above-quoted Judiciary Act of 1802, take cognizance of a certificate of division upon a motion to quash an indictment.

Mr. Evarts, Attorney-General, for the United States.

Mr. E. W. Stoughton, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The general rule undoubtedly is, that this court cannot, upon a certificate of division of opinion, acquire jurisdiction of questions relating to matters of pure discretion in the Circuit Court. Thus, it has been held that this court will not determine upon a certificate of division of opinion, whether or not a new trial shall be granted,* or whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise,† or any question in any equity cause relating to the practice in the Circuit Court, and depending on the exercise of sound discretion in the application of the rules which regulate the course of equity to the circumstances of the particular cause.‡

The principles by which the limit of jurisdiction, upon certificates of division, is determined, were quite fully considered in the case of *Davis* v. *Braden*,§ and the conclusion of the court was, that a division on a motion, to be granted or refused at the discretion of the court, does not present a point which can be certified under the act of Congress. Upon this principle, the court in that case refused to take cognizance, upon certificate, of the question, whether an action of

* United States v. Daniel, 6 Wheaton, 542.

† Smith v. Vaughan, 10 Peters, 366.

‡ Packer v. Nixon, Ib. 410. § Ib. 288.

detinue, founded upon tort, when abated by the death of the defendant, can be revived against his personal representatives.

In the opinion then delivered, the court took notice of the case of *The United States* v. *Wilson*,* supposed to be an authority for taking cognizance of the question made by the motion to revive. In that case the question certified was, whether a prisoner, convicted of a capital crime, could have any advantage from a pardon without bringing it judicially before the court; and it arose upon a motion of the district attorney for sentence. The court regarded this as a question going to the merits, and not determinable in the exercise of mere discretion; and, therefore, held this case not to be an authority for another, in which the merits were not involved in the question certified.

There are other cases in which the court has taken cognizance of questions directly affecting the merits of the cause, even though arising, in form, upon motions determinable at discretion. The case of *The United States* v. *Chicago*,† where the question certified arose on a motion to continue a temporary injunction, granted by the district judge, until final hearing on the merits, must be regarded as one of this character. The continuance of the injunction was clearly matter of discretion with the court; but the question certified involved the right of the United States in the land which was the subject of the suit, and was one proper for consideration upon the motion for continuance. The court held, though not unanimously, that the case was exceptional in its character, and that cognizance of the question certified might be properly taken. It may be doubted whether, in this instance, the exception made to the general rule was quite warranted by the principle established in prior decisions.

In the latter case of *The United States* v. *Reid & Clements*,‡ the point of jurisdiction upon certificate was not noticed. One of the questions certified seems, however, to have been clearly cognizable here. The defendants had been sepa-

* 7 Peters, 150. † 7 Howard, 190. ‡ 12 Id. 361.

rately tried, and one of them, when upon trial, had proposed to call the other as a witness, and the court had rejected the testimony. The question certified was, whether this ruling was correct. It arose upon motion for new trial, but it was plainly a point which must be determined, as of right, before sentence could be pronounced; and the certificate therefore was within the principle of *The United States* v. *Wilson*.

The motion to quash, upon which the question now before us arose, was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers* is, that "a motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception."

When made in behalf of defendants, it is usually refused, unless in the clearest cases, and the grounds of it are left to be availed of, if available, upon demurrer or motion in arrest of judgment.

It is quite clear therefore that we cannot take cognizance of the questions certified to us in the present condition of the case. They may hereafter arise upon demurrer, or on motion in arrest, and if the opposition of opinion shall still exist, can be again presented for consideration here.

At present the case must be

DISMISSED FOR WANT OF JURISDICTION.

AGAWAM COMPANY v. JORDAN.

1. In a suit in chancery under a patent, evidence of prior knowledge or use of the thing patented is not admissible, unless the answer contains the names and places of residence of those alleged to have possessed a prior knowledge of the thing, and where the same had been used.
2. The defence, "that the patentee fraudulently and surreptitiously obtained the patent for that which he knew was invented by another," is not a

* 1 Colby's Crim. Stat. 268 and 269; 1 American Crim. Law, 518 and 519.

sufficient defence to a charge of infringement, unless accompanied by the further allegation, that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention.

3. The inventor who first perfects a machine, and makes it capable of useful operation, is entitled to the patent.
4. Where a master workman, employing other people in his service, has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestions from a person employed by him, not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement.
5. Letters patent of long standing will not be declared invalid upon testimony largely impeached; as *ex. gr.*, where forty persons swear that the character of the witness for truth and veracity is bad; although very numerous witnesses on the other hand swear that they never heard his reputation in that way questioned.
6. On a bill in chancery, for an infringement of a patent, the allegation in an answer, of sale and public use "prior to the filing of an application for a patent," with the consent and allowance of the inventor, is insufficient, unless it is also alleged in the answer that such sale or use was more than two years before he applied for a patent.
7. Forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by practical experiment, affords no ground for presumption of abandonment.
8. Where a patent is extended by virtue of a special act of Congress, it is not necessary to recite in the certificate of extension all the provisos contained in the act.
9. A patentee claiming under a reissued patent cannot recover damages for infringements committed antecedently to the date of his reissue.

ERROR to the Circuit Court for Massachusetts, the suit having been one to restrain the use, by the Agawam Woollen Company, of a certain machine for manufacturing wool and other fibrous materials, patented to John Goulding.

The process formerly in use in the production of yarn from wool, was by a set of carding engines, a billy and a jenny; a series usually consisting of three carding machines, commonly called a first breaker, a second breaker, and a finisher, one billy and two jennies, sometimes two double carding machines being used instead of three single carding machines.

The wool was fed to the first carding machine, called the first breaker, on a feed table, and was doffed off the doffer

of that machine by a comb. The material thus doffed off was taken to the second carding machine, called the second breaker, and was fed into it in the same manner as in the first, and upon leaving the doffer, was either wound round a large cylinder, making what was called a lap or bat, or dropped on the floor. The material was then taken to the third carding machine, and was fed to it in the same way, and, by a roller and shell at the delivery-end of this machine, was made into short rolls, which were about as long as this machine was wide. These short rolls were then taken to the billy, and were spliced together on the apron roll of the billy by children, by rubbing the rolls together with their hands, and were carried forward on the billy, after being so spliced together, by the apron roll, which fed them through the jaws of the billy to the spindles. The product of the billy was called roving. This roving was then taken from the billy and set up on cops to the jenny, upon which it was spun into yarn.

As early as 1812, Goulding, born in 1793, the son of a machinist, and from early years familiar in his father's factory with machines and machinery, sought to improve this long train of engines, called in their whole series "the carding machine." He thought that he could so improve it as to produce yarn from wool in a cheaper manner, of better quality, and in greater quantity than was produced by the old process. Engaged at different times in Massachusetts, at Worcester, Halifax, and, lastly, at Dedham, where, in 1823, he fixed himself as both a machinist and a manufacturer of textile fabrics, he only sought, for some years, to improve the billy; but, as experiments were made by him, he aimed, finally, at dispensing with the billy entirely, and accomplishing with four machines that which had previously required the use of five. His purpose was also to dispense with short rolls entirely, and get the perpetual or endless roll, and carry it through its different stages, from the crude wool until it became finally converted into yarn.

The result of his experiments and trials, extending over a long term of time, and after the use by him of very many

devices, was, as he alleged, successful. He dispensed with the billy entirely, and by processes testified to by many witnesses as invented by him, and by himself so sworn to be, obtained a continuous or perpetual roll as the product of each carding engine; accomplished a successful mixing of the wool—as well where the same color was used, as where different colors were used; dispensed with a large amount of manual labor, and secured a larger product at half the expense as compared with the old process, a better and more uniform roving, and a better and more uniform quality of yarn.

Such was his view and his case, as set forth in the bill.

But Goulding's claim to these high merits of invention were not conceded. There were witnesses also, chiefly one Cooper, of Concord, New Hampshire, who swore that he derived great aid from others. Specific conversations and admissions of Goulding, about the time of the alleged invention, were sworn to by Cooper. But his testimony was strongly impeached; and relationship, bad feeling, or interest were shown in others of the witnesses. As to Cooper himself, forty different persons swore that his general reputation for truth and veracity was bad. Very numerous ones, however, swore that they had not heard it called in question. This sort of testimony covered some hundred pages of the record.

Taken all together, this part of the case, on favorable assumption for the defendant, seemed somewhat thus: After Goulding came to Dedham, and had been experimenting there for a considerable time, one Edward Winslow, a blacksmith by trade, but if the testimony in his favor was to be believed, an ingenious man, came into his service. Winslow professed no skill out of his business, but made himself useful generally in whatever Goulding found it most convenient to set him to do; working generally in iron. He had no charge of Goulding's machine shop, but was not unfrequently in it. Goulding himself directed all that was done about machinery, whether as to making or as to altering it. In 1824, Winslow having been to a neighbor's factory, where

certain devices, meant to produce long or endless rolls, and to serve as receptacles for the rovings, had been introduced on machinery for spinning yarn, Goulding, who had now nearly completed his improvement, and while he was diligently prosecuting his experiments, asked him what he thought of them. Winslow replied that the principle of them was good, but that the agencies employed were bad, and suggested certain substitutes (a spool and drum) for them. "You don't know anything," was Goulding's first reply. However, upon seeing an experiment, apparently at first successful, made at his own mill, on the basis of Winslow's idea, he exclaimed, "Winslow, you have got it. I will give you $2500 and half of what we can make." But the experiment broke down in the process of exhibiting it. Goulding then exclaiming, "Your plan isn't worth a cent. I would not give a fig for it," left the mill. Upon further conversation and consideration, Goulding saw merit in Winslow's suggestions, and having made them practicable by an addition of his own (the "traverser," whose effect was to wind the roving evenly on the spool), he adopted them (instead of cans, the far less convenient agency previously used) as two items of his far larger improvement. As it turned out in the result they proved useful.

It appeared, however, and was so assumed by this court, after a very minute statement* in the terms of art, of many details of the matter, that it was only as an *auxiliary* part of Goulding's invention that they were of value, and that they did not make either the entire invention or any one of its separate combinations.

Goulding went on continuously engaged in perfecting his improvement, till November, 1826, before the middle of which month he filed his application for letters patent, and on the 5th December he received them for the whole combined invention. None of the devices described in his specifications were new, and the claims were for combinations arranged in a manner set forth.

* See it, *infra*, pp. 598, 603.

The patented improvement soon came into universal use, and worked a revolution, both here and in Europe, in the art of manufacturing fibrous yarns. It has not been improved, but remains now what it was when the patent was granted.

The patent granted, as above mentioned, expired December 5, 1849. Goulding desired to make application for its renewal, but through erroneous information given him by the Commissioner of Patents, he failed to apply for the extension until too late for the commissioner legally to entertain his application, and the patent expired accordingly as already stated. Congress finally, and after persistent efforts by Goulding, passed May 30, 1862, a special act, authorizing the commissioner to entertain his application for extension as though it had been made within the time prescribed by law. This special act contained a proviso,

"That the renewal and extension shall not have the effect, or be construed, to restrain persons who may be using the machinery invented by said Goulding at the time of *the renewal and extension*, thereby authorized for continuing the use of the same, nor subject them to any claim or damage for having so used the same."

The patent was extended by the commissioner August 30, 1862. The patent having been reissued July 29, 1836, was again reissued in June, 1864, having before this last date become vested in Jordan, the complainant, to whom the reissue was made.

The proviso of the act authorizing a renewal and extension, was not recited in the reissued letters patent. But the certificate of renewal and extension was made subject, in express terms, to the proviso contained in the act. In this condition of things, the Agawam Woollen Company, using certain machinery alleged to be the same with that now patented to Jordan, he filed his bill against them, praying for injunction, account, and other relief. The bill put specific and categorical interrogatories in reference to the fact of infringement. The defendants did not answer the interrogatories as put. They only denied the use of any machinery

"in violation and infringement of any rights of the plaintiff, or that they are using, or have made, or sold, or used any machines not protected or covered by the proviso in the act of Congress;" and putting it to the court to say whether they should make further answer. The machinery which they did use, they began to use after the date of the extension (the company not being incorporated at that date), but before the surrender and reissue of June, 1864.

With this implied admission of infringement, the answer put the defence chiefly on four grounds:

First. "This defendant denies that the said Goulding ever bestowed any ingenuity upon the invention or improvement mentioned in either of the letters patent aforesaid, and alleges that the improvements therein described, were invented and applied by one Edward Winslow, then of Dedham, from whom said Goulding first obtained knowledge of the same, and fraudulently and surreptitiously obtained a patent on the 15th day of December as aforesaid, for that which he well knew was the invention of said Winslow, at and before the application by him for a patent, as set forth in said bill."

Second. That at the time of Goulding's application for a patent, the invention had been on sale, and in public use, with his consent and allowance, for a *long time;* and that he abandoned the same to the public. Sale and public use *for more than two years*, prior to the application for a patent, were not, however, alleged in the answer.

Third. That the certificate on the reissued letters patent of 1864, was not in conformity with the act of Congress, and did not contain the limitations or conditions as annexed to the patent, as extended; and, therefore, that the reissued patent was void.

Fourth. That the defendant's machinery, although built subsequently to the date of the extension, yet, having been in use before and at the time of the reissuing of that patent in 1864, was within the saving proviso of the act of Congress.

Argument against the patent.

The court below decreed for the complainant, and the case was now here on appeal by the other side.

Mr. Robb, for the appellant—after remarking that nearly half a century had passed since the events which were the subject of investigation, occurred; that nearly all of those who had personal knowledge of them, had been dead many years; and that, in every patent case, the loss of testimony affected the *defendant* more seriously than it did the plaintiff, since the defendant has upon him the burden of overcoming the presumption which the plaintiff derives from his patent alone—commented on the facts, arguing that Winslow was the undoubted inventor of the spool and drum—most important features of the mechanism patented—and that in regard to these, Goulding had no merit.

The efforts at impeachment of Cooper were to be received (the learned counsel argued) with great distrust. It was easy to bring men, in almost any case, who would swear before a commissioner, and from the bias of revenge or interest, that *they* would not believe a particular witness, and so to make a record the vehicle of scandal, which would never have been spoken if the witnesses had been in the presence of the court, under the restraints of law, when they told their stories. In this case, of course, the testimony had been taken in this private manner. The learned counsel then contended:

1. That the invention had been in use for more than two years, and had been abandoned, as appeared, by the delays of Goulding in getting a patent; moreover, he had not an extension until twenty-two years after the expiration of the first patent.

2. That the proviso in the act of Congress was a limitation of the authority vested in the commissioner. The grant was to be limited "so that it shall not be construed" to vest, &c. Now by law, as is well known, no extension of a patent shall be granted by the commissioner after the expiration of the term for which it was originally issued. *Primâ facie*, therefore, this patent is void, and it is only by invoking the

statute that it can be saved. Now, this being a private statute, it should be incorporated with, and accompany the exercise of the authority claimed under and by virtue of it.

3. That by a true interpretation of the act, the defendant's machinery came within the proviso of the act of Congress.

Messrs. B. R. Curtis and Stoughton, contra.

The patent is *primâ facie* evidence that Goulding was the original and first inventor of the thing patented.

The answer charges a *fraudulent* and *surreptitious* appropriation, by Goulding, of Winslow's invention, and fraud is to be proved by the party alleging it.

To sustain this burden, it is not sufficient for the appellants to prove that Winslow, while a hired workman of Goulding, suggested mechanical means of carrying some part or parts of Goulding's plan into effect; *he must prove that the entire plan of the invention, as described by Goulding in the original letters patent of December* 15, 1826, was the *sole* invention of Winslow, for the answer does not set up a joint invention by Goulding and Winslow, but a several invention by Winslow, and a fraudulent and surreptitious appropriation of the entire invention by Goulding.*

But these principles of law need not be invoked. There is no sufficient evidence that Winslow invented anything. The attempt is to overturn a title of forty years' standing on evidence that would not be trustworthy, even if it related to recent occurrences. To recollect specific language after the lapse of forty years, is impossible. Conversations are the least trustworthy of all kinds of evidence, even when alleged to be recent; but here, where they are confessed to have occurred upwards of forty years ago, no reliance can be placed on them.† The facility with which conversations can be

* Pitts v. Hall, 2 Blatchford, 234; Alden v. Dewey, 1 Story, 338, 339; Dixon v. Moyer, 4 Washington, 71, 72; Teese v. Phelps, McAllister, 48; Story, J., in Washburn v. Gould, 3 Id. 133; Webster's Patent Cases, 132, note *e*; Allen v. Rawson, 1 Manning, Granger & Scott, 574–577; Eyre v. Potter, 15 Howard, 56.

† Badger v. Badger, 2 Wallace, 87; Pennock v. Dialogue, 4 Washington, 538; Alden v. Dewey, 1 Story, 339.

either invented or distorted, the necessity of knowing all that was said, the occurrences which gave rise to the conversations, and the circumstances under which the conversations occurred, the inability of human memory to retain the precise language that was used, the proverbial fact of the different versions which different witnesses give even of recent conversations, the radical change in meaning which even the slightest transposition of language will sometimes make, all concur in showing that evidence of them is the most unsatisfactory testimony upon which a court of justice can act.

Moreover, forty witnesses have sworn that Cooper's general reputation for truth is bad. Their testimony is affirmative, while all the counter testimony is negative. When we consider the facility with which bad men, with some good qualities, can rally friends in support of their character, it is not surprising that many should have appeared to assist Cooper. In a place as large as Concord, there are undoubtedly men whose characters for veracity are bad, and yet many witnesses could be produced who never heard their characters spoken of in respect to veracity. The testimony here is simply negative, not showing—because some of the witnesses have not heard Cooper's character pronounced bad—that it is not bad, but only showing that they have not heard it stated to be so. It is impossible, we submit, for any man's character for truth and veracity to be otherwise than bad, when forty witnesses swear that it is bad, even if ten times that number should be produced to swear that they had never heard it questioned.

The remaining grounds of defence have no foundation in the facts of the case, nor in the law of patents by any possible view of it.

Mr. Justice CLIFFORD delivered the opinion of the court.

Patentees acquire, by virtue of their letters patent, if properly granted and in due form, the full and exclusive right and liberty of making, using, and vending to others to be used, their respective inventions for the term of years

allowed by law at the time when the letters patent were issued. Such exclusive right and liberty may be held and enjoyed by the patentee throughout the entire term for which it is granted; or he may assign the letters patent, by an instrument in writing, either as to the whole interest or any undivided part thereof; or he may grant and convey to another the exclusive right under the patent to make and use, and grant to others to make and use, the thing patented, within and throughout any specified district.*

Damages may be recovered by an action on the case for any infringement of that exclusive right and liberty; or the party aggrieved may, in any case, at his election, bring his suit in equity and pray for an injunction to prevent the violation of the same; but the express provision is, that all such actions, suits, and controversies shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any District Court having the powers and jurisdiction of a Circuit Court.†

Jurisdiction of such cases is exclusive in the Circuit Courts, subject to writ of error and appeal to this court, as provided by law; but the requirement is, that the suit must be brought in the name of the person or persons interested, whether patentees, assignees, or as grantees, as aforesaid, of the exclusive right within a specified locality.‡

Present suit was in equity, and was founded on certain reissued letters patent granted to the complainant on the twenty-eighth of June, 1864, as the assignee, by certain mesne assignments, of John Goulding, who was the original patentee, and who, as alleged, was the original and first inventor of the improvement. Original patent was granted December 15th, 1826, for the term of fourteen years, and was, as alleged, for a new and useful improvement in the mode of manufacturing wool and other fibrous materials; but the claims of the specification were defective, and it was surrendered on that account, and reissued July 29th, 1836, for the residue of the original term.

* 5 Stat. at Large, 119, 121. † Id. 123, 124. ‡ Id. 124.

Representations of the complainant were, that the original patentee, without any neglect or fault on his part, failed to obtain by the use and sale of the invention a reasonable remuneration for his time, ingenuity, and expenses employed and incurred in perfecting the invention, and introducing the same into use within the time for which the patent was originally issued, and that he failed also, by accident and mistake, to obtain an extension of the patent before the expiration of the original term.

Power of the commissioner to renew and extend the patent having expired, the allegation was that the original patentee applied to Congress, and that Congress, on the thirtieth of May, 1862, passed an act for his relief. Pursuant to that authority, the bill of complaint alleged that the commissioner, thereafter, on the thirtieth of August, in the same year, renewed and extended the patent, in due form of law, for the further term of seven years from and after that date, subject to the provisions contained in the act conferring the authority.

Derivation of the title of the complainant is fully set forth in the bill of complaint, but it is unnecessary to reproduce it, as it is not the subject of controversy in this case. Possessed of a full title to the invention by assignments, the complainant, as such assignee, surrendered the letters patent, and the commissioner, on the twenty-eighth of June, 1864, reissued to him the original patent, as extended under the act of Congress, for the residue of the extended term.

Founded upon those letters patent, the bill of complaint alleged that the assignor of the complainant was the original and first inventor of the improvement therein described, and the charge is that the corporation respondents, having full knowledge of the premises, and in violation of the complainant's exclusive rights and privileges, so acquired and secured, have, since the date of the reissued letters patent, and without his license or consent, made, used, and sold, and continue to make, use, and sell, in large numbers, cards, jacks, and machinery, embracing and containing mechanism substantially the same in principle, construction, and mode

of operation as the improvement so acquired and owned by the complainant.

Prayer of the bill of complaint was for an account, and for an injunction, and for such other and further relief as the nature and circumstances of the case shall require.

Respondents appeared and filed an answer, and proofs were taken by both parties, and they were heard in the Circuit Court upon bill, answer, replication, and proofs, and a final decree upon the merits was rendered for the complainant, and thereupon the respondents appealed to this court.

Numerous defences were set up in the answer, but none of them will be much considered except such as are now urged upon the consideration of the court.

The grounds of defence specially enumerated in the brief of the appellants, and urged in argument, are as follows:

1. That the combinations set forth in the several claims of the patent were first invented by one Edward Winslow, and that neither of them was original with the assignor of the complainant.

2. That the invention, at the time the application for the original patent was made, had been on sale and in public use, with the consent and allowance of the applicant, for more than two years, and that he had abandoned the same to the public.

3. That the reissued letters patent described in the bill of complaint are void, because they do not contain the limitations and conditions expressed in the extended patent, and were not issued in conformity with the act of Congress passed for the relief of the original patentee.

4. That the respondents' machinery, having been in use before and at the time the patent in this case was granted, is within the saving clause of the proviso in the said act of Congress.

I. Exception might well be taken to the first proposition upon the ground that it is a departure from the special defence set up in the answer, unless it can be admitted as included in the more general allegation, denying that the

assignor of the complainant was the original and first inventor of the improvement described in the patent.

Persons, sued as infringers, may plead the general issue in suits at law, and may prove, as a defence to the charge, if they have given the plaintiff thirty days' notice of that defence before the trial, that the patentee was not the original and first inventor of the thing patented; but the same section which authorizes such a defence provides that whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, "he shall state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."*

Evidence to prove such a defence, in a suit at law, is not admissible without an antecedent compliance with those conditions, and the settled practice in equity is to require the respondent, as a condition precedent to such a defence, to give the complainant substantially the same information in his answer. Unless the practice were so, the complainant would often be surprised, as the rule of law is that the letters patent afford a *prima facie* presumption that the patentee is the original and first inventor of what is therein described as his improvement, and if the respondent should not be required to give notice in the answer that proofs would be offered to overcome that presumption and establish the opposite conclusion, very great injustice might be done, as the complainant might rely upon that presumption and fail to take any countervailing proofs.†

Better opinion is, that the defence embraced in the first proposition of the respondents, is not admissible under that allegation in the answer which denies that the assignor of the complainant was the original and first inventor of the improvement. Such a defence, if recognized at all in this case, must be admitted under that part of the answer which was evidently framed for that special purpose.

* Wilton v. Railroad, 1 Wallace, Jr., 195.

† Teese v. Huntingdon, 23 Howard, 10.

Opinion of the court.

Substance and effect of those allegations are, that the respondents deny that the original patentee ever bestowed any ingenuity upon the improvements, and they allege that the same were invented and applied by one Edward Winslow, that the patentee first derived knowledge of the invention from that individual, and that the original patentee fraudulently and surreptitiously obtained the patent for that which he well knew was the invention of his informant.

No exception was taken to the answer in the court below, and in that state of the case the allegations of the answer, that the invention was made by a third person and not by the assignor of the complainant, may be regarded as a good defence, but it is quite clear that the charge that the original patentee in this case fraudulently and surreptitiously obtained the patent for that which he well knew was invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defence to the charge of infringement.*

Viewed in any light the proposition amounts to the charge that the invention was made by the person therein mentioned, and not by the assignor of the complainant, and the burden to prove it is on the respondents, not only because they make the charge, but because the presumption arising from the letters patent is the other way.

Application for a patent is required to be made to the commissioner appointed under authority of law, and inasmuch as that officer is empowered to decide upon the merits of the application, his decision in granting the patent is presumed to be correct.†

Before proceeding to inquire whether or not that defence is sustained by the proofs, it becomes necessary to examine specifications and claims of the patent, and to ascertain, by a comparison of the mechanism therein described, with the

* 5 Stat. at Large, 123; Reed v. Cutter, 1 Story, 599.

† Pitts v. Hall, 2 Blatchford, 229; Union Sugar Refinery v. Matthiessen, 2 Fisher, 600.

antecedent state of the art, the true nature, character, and extent of the improvement.

Sets of carding machines, for the production of yarn from wool, were well known, and in use before the invention of the original patentee. They usually consisted, besides the spinning-jenny, of three carding machines, called the first and second breaker, and the finisher, but they could not be used to much practical advantage, in connection with the jenny, without a separate machine, called the billy, for splicing the rolls. Two jennies were often used, instead of one, in that combination, and in some instances, two double carding machines were preferred, instead of three single machines.

Like the still older carding machine, the breaker had what was called a feed-table, and the wool, previously prepared by other means, was placed on that table, and was, by that means, fed to the carding mechanism, and having passed through the carding apparatus to the delivery-end of the machine, was stripped from the device called a doffer, and fell to the floor. The device for stripping the filament from the doffer was a comb, which constituted a part of the machine. Second breaker was similar in construction to the first, and the process of feeding and carding was the same, but the filament from the first breaker constituted the material to be used in the second, instead of using wool prepared by hand, or from the picker, and the filament when carded and stripped from the doffer, was wound round a drum. The method of feeding the material into the carding apparatus of the finisher was also the same, but it was provided with an additional apparatus, at the delivery-end of the machine, called the roller and shell, which formed the material into short rolls. Those rolls were about the length of the card surface of the doffer. They were taken to the billy, and were there spliced by hand, on the apron of that machine, and, as the apron moved forward, they were fed to the spindles, and converted into roving, suitable to be spun into yarn.

Goulding aimed to dispense with the billy altogether, and

sought to accomplish, with four machines, what had previously required the use of five; and the evidence shows, beyond controversy, that his invention enabled manufacturers to produce yarn from wool, at much less cost, of better quality, and in greater quantity, than was produced by the old process. His purpose, also, was to dispense with short rolls, and to introduce the long or endless roll in its place. Years were spent by him in experiments to accomplish these purposes, but the result was that he was successful. He dispensed altogether with the billy, and, by a new combination of old devices, he obtained the endless roll, and so perfected his machinery that he could use it successfully, from the moment the roving left the delivery-end of the first breaker, till it was converted into yarn, fit to be manufactured into cloth.

Attempt will not be made to describe the various plans which he formed, nor the experiments which he tried, as it would extend the opinion to an unreasonable length. Under his method, as described, the wool, as it comes from the picker, is placed on the table of the first breaker, and is fed to the carding apparatus as before, but the sheet of carded material, when stripped from the doffer, is taken away on one side of the delivery-end of the machine, by means of two rollers, through a turning-tube, or pipe, to which a slow rotary movement is given by a band passing from a drum, actuated by the machine, and operating upon a pulley affixed to the tube. Description is also given of the means by which the roving or sliver is condensed and wound round the bobbin, and also of the means by which it is retained in the proper position, and made to partake of the rotary movement communicated to the drum. Particular description is also given of the means by which the roving may be evenly wound upon the bobbins, either by carrying it and the drum backward and forward, or by passing it between guides, affixed to a bar, to which a similar movement is communicated.

Next step is, that the bobbins, with the roving thereon, twenty in number at least, are placed in a frame or creel, in

order that the roving may be fed to the second carding machine, and guided into it, between certain dividing pins, but it is taken away at the delivery-end, in a single roving, and by the same means as from the first machine.

Principal object in passing the material through the second breaker is, that it may be more completely mixed, so that every part of the roving will be of the same fineness. Third operation is, that the bobbins of roving, as delivered and wound in the second breaker, are placed in a frame or creel, similar to that before described, but each roving is now to be kept separate, and certain blocks are provided for that purpose, made broader in front than behind, so that each roving shall preserve its proper situation, without mingling with those adjacent to it, during the operation of carding, and also that it may finally reach its proper place upon the delivering cards.

The feeding of the material into the carding apparatus of the finisher is accomplished in the same way as before described, but the mechanism for carding, and for delivering the roving, is more complex, and widely different. Two delivering cylinders are constructed, placed one above the other, surrounded with wire card, in strips, with uncovered spaces of equal width, and so arranged that the uncovered spaces on one cylinder shall correspond with the strips of wire card on the other, for carding the separate rovings as they are fed into the carding apparatus. Different mechanism is also provided for removing the carded material from the delivering cylinders, which is accomplished by the rotary action of the tubes upon such material, by which the several filaments, as they are delivered, are formed into a loose continuous roving, which is guided between certain pins, and passed through certain rollers, in order to give the roving a sufficient coherence before it is wound on to the bobbins, to be used in the jenny.

Means for slightly twisting the roving as it leaves the finisher are also described, and the directions are that the guides of the finisher must have a lateral motion backward and forward, so that each roving may be regularly laid side by

side, within its own proper limits, and the devices to accomplish that function are fully described. Modifications were also made by the inventor in the devices of the carding apparatus of the finisher, and also in the apparatus for delivering the roving in the third operation, and for winding it on to the bobbins preparatory to their transfer to the jenny where the roving is spun into yarn. Those modifications of old machinery are minutely described in the specification, and it is obvious that they are of great value in accomplishing the final result, and that they constitute some of the main features of the invention.

Changes were also made in some of the devices of the jenny, and also in their arrangement and mode of operation as compared with prior machines, and those alterations also are so clearly described as to constitute a full compliance with the sixth section of the patent act. Substitutes are suggested for many of the described devices, but it is not practicable to enter into those details. Separate parts of the machinery, as used in the several combinations, are not claimed by the patentee. Omitting redundant words the claims of the reissued patent are to the effect following:

First. I claim in combination the following sets of apparatus making up a machine, namely: 1. A bobbin-stand or creel. 2. Bobbins on which roving may be wound. 3. Guides or pins. 4. A carding machine. 5. Condensing and drawing-off apparatus. 6. Winding apparatus, whereby rovings may be fed to a carding machine, carded, condensed, drawn off and wound again in a condensed state, substantially in the manner herein set forth.

Second. I claim the feed rollers of a carding machine, in combination with bobbins and proper stands therefor, and guides or pins whereby slivers or rovings may be fed to be carded by mechanism substantially such as herein described.

Third. I claim a delivering cylinder of a carding machine in combination with apparatus for drawing off, condensing, or twisting and winding carded filaments, by apparatus substantially such as herein described.

Lastly. I claim a mule or spinning-frame, provided with

spindles mounted on a carriage, and with jaws or their equivalents for retaining roving in combination with bobbins, whose axes are parallel, or nearly so, with the line of spindles, and rest upon drums revolving to unwind the bobbins substantially as herein set forth.

Careful attention to the description of the invention and the claims of the patent, will enable the parties interested to comprehend the exact nature of the issue involved in the first defence presented by the respondents. Purport of that defence is, that the invention was made by Edward Winslow, and not by the assignor of the complainant. The settled rule of law is, that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made some experiments towards putting it in practice. He is the inventor and is entitled to the patent who first brought the machine to perfection and made it capable of useful operation.*

No one is entitled to a patent for that which he did not invent unless he can show a legal title to the same from the inventor or by operation of law; but where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle, and may be embodied in his patent as a part of his invention.

Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued, must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made that it would have enabled an ordinary mechanic,

* Washburn et al. v. Gould, 3 Story, 133.

without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation.

Persons employed, as much as employers, are entitled to their own independent inventions, but where the employer has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestions from an employee, not amounting to a new method or arrangement, which, in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. But where the suggestions go to make up a complete and perfect machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another.*

Guided by these well-established principles, the first inquiry is, what was actually done by the person who, as alleged by the respondents, was the real inventor of what is described in the reissued letters patent? They do not pretend that he invented or even suggested the entire invention, nor all of the several elements embraced in any one of the separate combinations, as expressed in the claims of the patent; and if they did, it could not for a moment be sustained, as it finds no support whatever in the evidence. None of the devices described in the specifications are new, but the claims of the patent are for the several combinations of the described elements arranged in the manner set forth, and for the purpose of working out the described results.

Regarded in that light, it is clear that the concession that the person named did not invent nor suggest the entire invention, nor any one of the separate combinations, is equivalent to an abandonment of the proposition under consideration, as it is clear to a demonstration that nothing short of that averment can be a valid defence. Respondents do not

* Pitts *v.* Hall, 2 Blatchford, 234; Allen *v.* Rawson, 1 Manning, Granger & Scott, 574; Alden *v.* Dewey, 1 Story, 338; 1 Webster's Patent Cases, 132, note *e*; Curtis on Patents, 3d ed. 99; Reed *v.* Cutter, 1 Story, 599.

allege in the answer that the person named was a joint inventor with the original patentee, but the allegation is that he made the invention, and they deny that the assignor of the complainant ever bestowed any ingenuity upon what is described in the letters patent as his improvement. Such a defence cannot be successful unless it is proved, as common justice would forbid that any partial aid rendered under such circumstances, during the progress of experiments in perfecting the improvement, should enable the person rendering the aid to appropriate to himself the entire result of the ingenuity and toil of the originator, or put it in the power of any subsequent infringer to defeat the patent under the plea that the invention was made by the assistant and not by the originator of the plan.

The evidence shows that the original patentee was born in 1793, and that he commenced working on machinery in his youth, while he was with his father, and that, as early as the year 1812, he went into the employment of certain machinists, residing at Worcester, Massachusetts, who were engaged in constructing machinery for the manufacture of wool and cotton. While in their employment, he began experiments in woollen machinery. Those experiments were directed to the object of improving the billy, for the purpose of drawing out the carriage more accurately, and thereby making better work. Several years were spent in that business, but, in 1820, he went to Halifax, in that State, and, while there, he made numerous experiments to get rid of the billy entirely, and to dispense with short rolls, and substitute long rolls in their place. He remained there three years, and, during that time, he was constantly engaged in experiments to accomplish those objects. In the spring of 1823 he moved to Dedham, in the same State, and there hired a mill, and engaged in the manufacture of broadcloth, and also carried on the machine business, and the witness also states that he then prosecuted his experiments on a large scale.

Cans were used as a receptacle for the rovings, delivered from the doffers, before the drawing-off and winding apparatus, described in the patent, was invented. Rovings, be-

fore that invention, were spun from cans, instead of being wound upon, and spun from, spools or bobbins. Considerable importance is attached to the new method, as it was largely by that means that the use of the endless roving was made practical, and that the difficulty produced by the kinking of the roving, incident to the use of the cans, was overcome.

Theory of the respondents is, that the new method of accomplishing that function was invented by Edward Winslow, but their witness, John D. Cooper, only testifies that he made or suggested the spool and drum, which are not the only elements of that apparatus. Unaccompanied by the traverser, they would, perhaps, be better than the cans, but it is clear that the apparatus would be incomplete without that device, as it is by that means that the bobbins are evenly wound with the roving.

Testimony of that witness is, that he first suggested to Winslow that the roving must be wound on a spool, else they never could make good yarn, and he proceeds to state that they procured some pasteboard, and that Winslow made a pattern for a spool and drum from that material. Explanations, in detail, are given by the witness, of the several steps taken by them in accomplishing the change in the apparatus, and the witness states that the original patentee never saw the spool and drum until he came into the mill and saw those devices in the machine. Argument for the respondents is, that the spool and drum were invented by that party while he was in the employment of the original patentee, but the complainant denies the theory of fact involved in the proposition, and insists that the statement of the witness are untrue, and that he is not entitled to credit. Further statement of the witness is, that the improvement, as soon as it was perfected, was applied to all the carding and spinning machines in the mill, and that the mills, so adjusted as to embrace that improvement, were put in successful operation during the summer and autumn of that year.

Two answers are made by the complainant to the defence founded on that testimony, both of which are sustained by

the court. 1. Suppose the testimony of the witness to be all true, the complainant contends that it is not sufficiently comprehensive to support the allegations of the answer, nor even to support the proposition presented in the brief of the respondents. Taken in the strongest view for the respondents, the testimony merely shows that Winslow, or the witness Cooper, or both together, after the originator of the plan had nearly completed his great and valuable improvement, and while he was still prosecuting his experiments with the utmost diligence, suggested the spool and drum as substitutes for the cans, and that Winslow actually made those devices, and, with the aid of witness, put them into one of the machines as an experiment. When their employer first examined the arrangement, rude as it was, he expressed great satisfaction with it, but upon seeing it tried he pronounced it of no value. Neither of those opinions, however, turned out to be quite correct, as, upon further trial, when better adjusted, and by adding the traverser, so that the contrivance would wind the roving evenly on the spool, it proved to be a useful auxiliary part of the invention.

Valuable though it was and is, as aiding in the accomplishment of the desired result, it is nevertheless a great error to regard it as the invention described in the subsequent patent, or as such a material part of the same that it confers any right upon the party who made the suggestion to claim to be the inventor, or a joint inventor, of the improvement, or to suppose that the proof of what was done by that party can constitute any defence, as against the owner of the patent, to the charge of infringement.

Second answer to the defence founded on that testimony is, that the testimony is unreliable, because the witness is not entitled to credit. Hundreds of pages of the transcript are filled with proof, introduced either to assail or support the credit of that witness; but the court is of the opinion that it is not necessary to enter into those details, as the decision must be in favor of the appellee, even if every word stated by that witness is taken to be true. Entirely satisfied with our conclusion upon the merits, we are the less inclined

to enter into those details, as a full analysis of the proofs within reasonable limits would be impracticable; but it is proper to say that the proofs have been carefully examined, and it is the opinion of the court that the letters patent in this case cannot be held to be invalid upon such testimony.

II. Second defence, as stated in argument, is, that the invention, at the time the application for the original patent was made, had been on sale and in public use, with the consent and allowance of the applicant, for more than two years, and that the applicant abandoned the same to the public. Abandonment, as set up in the concluding paragraph of the proposition, is a distinct defence from that set up in the preceding part of the same proposition, and must be separately considered.

Sale and public use, for more than two years prior to the application for the patent, are not alleged in the answer. What the respondents do allege is, that the invention, at the time the application for a patent was filed, and for a long time before, had been on sale and in public use, which, without more, is not a good defence against the charge of infringement. On the contrary, the correct rule is that no patent shall be held to be invalid on account of such sale and public use, except on proof that the invention was on sale and in public use more than two years before the application therefor was filed in the Patent Office.*

Evidence to show that the invention of the original patentee, as finally perfected, was on sale and in public use more than two years before he applied for a patent is entirely wanting, and if such evidence was offered, it could not be admitted under the pleadings, as no such defence is set up in the answer.†

Undoubtedly an inventor may abandon his invention, and surrender or dedicate it to the public; but mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested

* 5 Stat. at Large, 354; McClurg v. Kingsland, 1 Howard, 209; Stimpson v. Railroad, 4 Id. 380.

† Foster v. Goddard, 1 Black, 518.

its value by actual practice, affords no just grounds for any such presumption.*

Application for a patent in this case was probably filed in the Patent Office before the middle of November, 1826, and the proofs are full and satisfactory to the court that the inventor, up to that time, was constantly engaged in perfecting his improvements, and in making the necessary preparations to apply for a patent.

III. Third defence is, that the reissued letters patent are void, because they were not issued in conformity with the act of Congress relating to that subject. Omission of the original patentee seasonably to apply for an extension of his patent was occasioned through erroneous information given to him by the commissioner, and not from any negligence or fault of his own. Acting upon information from that source, the inventor did not file his application until it was too late to give the notices as required by law, and the time for presenting such an application having expired, the commissioner had no power to grant his request. Deprived of any legal remedy under the general laws for the protection of inventors, he applied to Congress, and on the thirtieth of May, 1862, Congress passed an act for his relief.†

By the terms of that act he was authorized to apply to the commissioner for a renewal and extension of the letters patent, previously granted to him for the term of seven years from the time of such renewal and extension, and the commissioner was empowered to grant such renewal and extension, or to withhold the same under the then existing laws, in the same manner as if the application therefor had been seasonably made. Annexed to the body of the act is a proviso, that such renewal and extension shall not have the effect or be construed to restrain persons using the invention, at the time of such renewal and extension, from continuing the use of the same, nor to subject them to any claim or damage for having used such machinery.

* Kendall et al. v. Winsor, 21 Howard, 322; Pennock et al. v. Dialogue, 2 Peters, 1.

† 12 Stat. at Large, 904.

Objection now taken is, that the said proviso in the act of Congress is not recited in the reissued letters patent; but the objection is entirely without merit, as it appears in the record that the certificate of renewal and extension, as granted by the commissioner, was made subject in express terms to the proviso contained in that act.

Doubts are entertained whether even that was absolutely necessary; but it is clear that there is nothing in the proviso to warrant the conclusion that the form of the extended patent might not be the same as that in general use, and it is not even suggested that the form of the extended or reissued patent was in any respect different from the corresponding established forms of the Patent Office.

IV. Fourth defence is, that the respondent's machinery was in use before the patent in this case was granted; but it is not alleged that their machinery was in use before the extended patent was issued, and, therefore, the allegation affords no defence to the charge of infringement.*

Other defences are mentioned in the brief of the respondents; but none of them were urged in argument, and they must be considered as abandoned.

V. Infringement is an affirmative allegation made by the complainant, and the burden of proving it is upon him, unless it is admitted in the answer. Specific inquiries were made of the respondents in this case, and they did not satisfactorily answer those interrogatories. Evasive answers, under such circumstances, if not positively equivalent to admissions, afford strong presumptive evidence against the respondents. Apart from that, however, the answer of the respondents is unsatisfactory in other respects. They do not in terms deny that they have used, and are using, the invention as alleged; but what they do deny is, that they use any machinery in violation and infringement of any rights of the complainant, or that they are using, or have made, used, or sold any machinery not protected by the

* Stimpson v. Railroad, 4 Howard, 880.

proviso contained in the act of Congress passed for the relief of the original patentee.

Clear implication from the answer is, that they had made machinery such as that described in the letters patent, and if so, then they are clearly liable as infringers, as they were not incorporated at the date of the extended patent. Machines made since the patent was extended are not protected by that proviso, as is plain from its language; but the complainant cannot recover damages for any infringement antecedent to the date of the reissued patent, as the extended patent was surrendered.

Proofs of the complainant to show infringement consist in a comparison of the machines made by the respondents with the mechanism described in the patent, and in the testimony of scientific experts, and they are so entirely satisfactory, that it is not deemed necessary to pursue the investigation.

DECREE AFFIRMED.

MORGAN v. TOWN CLERK.

By the law, as settled in Wisconsin, a provision in a statute under which a town issued its bonds to a railroad, that a tax requisite to pay the interest on these bonds should be levied *by the supervisors* of the town, is not exclusive of a right in *the town clerk* to levy the tax under a general statute making it his duty to lay a tax to pay all debts of the town; a mandamus having issued under the first act, but after efforts to make it productive, having produced nothing.

ERROR to the Circuit Court for Wisconsin.

In 1853, the legislature of Wisconsin authorized the town of Beloit to issue its coupon bonds for the benefit of a certain railroad. The town did issue them accordingly; and a number of them, with coupons unpaid, having got in the hands of one Morgan, he brought suit and obtained judgment against the town.

The statute which authorized the town to issue the bonds thus enacted:

Argument for the defendant in error.

"The *board of supervisors* of the town of Beloit, whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said town, sufficient to pay the interest upon such bonds."

The legislature of the same State in 1858 enacted thus:

"No execution shall issue on any judgment against a town, but the same shall be collected in the manner hereinafter provided.

"Whenever an exemplified copy of any final judgment, rendered by any court of this State, against any town in this State, together with an affidavit, &c., shall be filed in the office of the town clerk of the town against which such judgment may have been rendered, it *shall be the duty of the town clerk* to proceed to assess the amount thereof, with interest from the date of such judgment to the time when the warrant for the collection thereof will expire, upon the taxable property of said town; and the same proceedings shall be had thereon, and the same shall be collected and returned in the same manner as other town taxes, and shall be paid to the party entitled thereto."

Morgan having obtained, under the act of 1853, a mandamus, attachment, &c., against different boards of supervisors, which, however, from their resignations, vacation of office, &c., produced no fruit, he applied to the court below, having first filed the required exemplification, affidavit, &c., for a mandamus on the town clerk, under the last quoted act, to compel *him* to levy a tax. The court below refused to grant the mandamus asked for, on the ground, as was said, that the act of 1853 provided a special remedy exclusive of the general one of the act of 1858. Whether it did so or not, was now the question on appeal.

Mr. Carpenter, for the plaintiff in error, contended that he had exhausted his remedy under the act of 1853; and that he might seek relief under both acts until he obtained one satisfaction.

Messrs. Palmer and Ryan, contra:

This is not a case of alternative remedies, of which the re-

lator has an election. He can have but one payment, levied by one tax, once assessed. And if it be the duty of the supervisors to levy the tax, it cannot be the duty of the clerk. The special act providing for the special tax, to pay these special liabilities, to be levied by the supervisors, takes this judgment out of the general act, providing for the assessment of a tax by the clerk, to pay other judgments against towns. The relator should have applied in the court below for *mandamus* against the supervisors, and not against the clerk.

Mr. Justice SWAYNE delivered the opinion of the court.

On the 9th of January, 1861, the plaintiff in error recovered a judgment against the defendant in error for $1540 damages, and for costs. The cause of action was overdue interest coupons attached to bonds issued by the town of Beloit in payment of its subscription to the stock of the Racine, Janesville, and Mississippi Railroad Company, pursuant to chapter 12 of the local and private laws of Wisconsin, passed in 1853. The plaintiff in error instituted the proceedings in the court below to obtain a writ of mandamus, directed to the town clerk of the defendant, commanding him to assess the amount necessary to pay the judgment and interest, upon the taxable property of the town, and to place the assessment upon the next assessment and tax roll for collection. A statute of Wisconsin* forbids the issuing of an execution against a town, and expressly prescribes this mode of procedure.

Ample authority to issue the writ is given by the statute. The proceedings on the part of the plaintiff in error are in all things in strict conformity to its requirements. The power of the Circuit Court to issue writs of mandamus to State officers in proper cases is no longer an open question in this court; and it has been repeatedly held to be an appropriate remedy in the class of cases, to which the one lying at the

* Ch. 15, § 77, Revised Statutes of 1858, p. 186.

foundation of this proceeding belongs.* We learn from the record that the court below denied the writ upon the ground that the statute under which the bonds were issued, provided that the requisite tax should be levied by the supervisors of the town, and that this remedy was exclusive of all others. There are several obvious answers to this view of the subject. We deem it sufficient to advert to one of them. In the case of *Bushnell* v. *Gates*,† this precise question, arising under the same circumstances, came before the Supreme Court of Wisconsin. It was held that the objection was untenable, that the statute authorizing the writ to go against the town clerk applied to the case, and that it was conclusive. If there could otherwise have been any doubt upon the question, this determination by the highest court of the State giving a construction to the statute under consideration, is unanswerable. We need not further consider the subject.

The judgment below is REVERSED. A mandate will be sent to the Circuit Court, directing that an order be entered in the case

IN CONFORMITY WITH THIS OPINION.

MORGAN *v.* BELOIT, CITY AND TOWN.

Where the legislature creates a city, carving it out of a region previously a town only, and enacts that all bonds which had been previously issued by the town should be paid when the same fell due, by the *city and town*, in the same proportions as if said town and city were not dissolved, and that if either at any time pays more than its proportion, the other shall be liable therefor, a bill will lie in equity to enforce payment by the two bodies respectively, in the proportion which the assessment rolls

* The Commissioners of Knox Co. *v.* Aspinwall, 24 Howard, 376; Von Hoffman *v.* The City of Quincy, 4 Wallace, 535; Riggs *v.* Johnson County, 6 Id. 166.

† Not yet reported.

show that the property in one bears to the property in the other. A bondholder is not confined to *mandamus* or other legal remedies, if such exist.

APPEAL from the Circuit Court for Wisconsin.

In 1853, the legislature of Wisconsin authorized *the town* of Beloit to subscribe to the stock of a railroad company, and to pay therefor in bonds of the town. The town subscribed and issued its bonds, a portion of which came to the hands of one Morgan, a *bonâ fide* purchaser.

In 1856, the legislature created *the city* of Beloit, this city being carved out of a portion of the territory which had constituted the town of Beloit. The charter of the new city thus provided:

"All principal and interest upon all bonds which have heretofore been issued by the town of Beloit, . . . *shall be paid when the same or any portion thereof shall fall due*, by the *city* and *town* of Beloit, in the *same proportions as if said town and city were not dissolved. And in case either town or city shall pay more than their just and equal portion of the same at any time, the other party shall be liable therefor.*"

This provision was re-enacted in 1857.

After the date of this act, and between it and 1867 inclusive—the interest on the bonds being unpaid for every year after 1854—Morgan brought several suits, in the Circuit Court for Wisconsin, against "the town of Beloit," for the interest due for the years respectively, and on the 25th of September, 1867, got judgment against the *town* for it. The judgments being unpaid, he now filed a bill in the court below against the *town and city* of Beloit. The bill set forth facts above stated, alleged that the "amount of said judgments *ought* to be paid by said defendants in the proportions respectively as provided in the said acts;" that the taxable property of the city exceeded that of the town; and that though the city "ought to pay the proportion provided in the acts," yet that the complainant was remediless at law. It then showed, by tabular exhibit, the amount of the interest due on the bonds held by him, in each year respectively, from 1855

to 1867; then by like exhibit the proportion in value, which, taking the rates of assessment made in each year as a basis, the taxable property of what was now the town bore to what was now the city, in every year, from 1855 to 1867; then showed, by similar exhibit, that, taking these relative exhibits, the town would be liable on the coupons for each respective year for so much and the city for so much, the balance, namely; the whole making, with interest from the date of the judgments obtained (which the bill alleged "ought to be paid by the said town and city respectively"), the sum of $60,443, as against the city, and $17,986, as against the town.

After alleging that "the city and town ought respectively to pay interest" on the respective total amounts, from the day when the judgments were obtained till the actual payment of them, and "ought each to pay one-half the costs recovered in the judgments," the bill concluded thus:

"To the end, therefore, that the said defendants may, if they can, show why your orator should not have *the relief hereby prayed*, and may upon oath, &c. . . . and that your orator may have such *other and further* relief as the nature of his case may require, and as shall be agreeable to equity and good conscience."

Prayer for subpœna, &c.

The defendants (town and city) demurred, and the bill was dismissed. Appeal accordingly.

Mr. Carpenter, for the appellant:

The complainant was clearly entitled to some remedy against the city for its proportion of the debt, and the question is, what was the appropriate remedy?

On bonds given by the town, a *joint* action at law could not be maintained against the town and city.* To an action at law against the city alone, the plea of *non est factum* would be true in fact and fatal in law. If any action at law could be maintained against the city, it would be debt *founded on*

* Goodhue v. Beloit, 21 Wisconsin, 636.

the statute. But there would be the difficulty of settling, as between the city and the town, the proportion which each ought to pay, in an action where the town was not a party. This consideration alone gives a court of equity jurisdiction. If the town were compelled to pay the whole debt, it would be entitled, by the express provisions of the statute, to an action against the city for its proportion. Circuity of actions —that which courts desire to prevent—is therefore avoided by maintaining a suit in equity against both. A court of equity is the only tribunal that can render complete justice between all the parties.

Messrs. Palmer and Ryan, contra:

The bill is without any prayer for special relief. What, indeed, is its object? Is it for a declaratory decree of the proportions in which the judgments should be paid by the city and town, leaving the plaintiff to his *mandamus* to enforce a tax accordingly? Or is it for a decree awarding execution against the defendants? No one can tell. The omission to make the proper prayer is fatal. Even under the dangerous and inconvenient rule, held in a few cases, that a prayer for general relief is sufficient, and that the special relief may be prayed for at the bar, on hearing, the bill must indicate by its frame the special relief sought, which this bill does not. But this court has wisely abrogated that rule, and by its twenty-first rule in equity, provides that "the prayer of the bill *shall* ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief."

On merits, the case is not good. Though equity is liberal in the adaptation of her remedies, she does not give a remedy to every party merely because he is in difficulty, nor unless his difficulty be covered by some specific ground of equitable jurisdiction. Here there is an adequate legal remedy by *mandamus*. It may be a troublesome remedy. But he has it. And equity will not devise a new ground of jurisdiction because a speculator in town bonds is unlucky in his legal remedies.

Reply: The prayer is, *in effect*, a prayer for both special and general relief. But if it were for general relief alone, that would be sufficient, upon the facts stated in the bill.*

Mr. Justice SWAYNE delivered the opinion of the court.

The bill of the appellant presents the following case: In the year 1853, the legislature of Wisconsin, by an act duly passed, authorized the *town of Beloit* to subscribe for $100,000 of the stock of a railroad company authorized to construct a railroad from the city of Racine to the village of Beloit, and to make payment in its bonds to be issued for that purpose. The bonds were accordingly issued. A portion of them came into the hands of the appellant, and he recovered upon them the several judgments at law described in the bill. These judgments are all in full force and unsatisfied. By an act of the legislature, passed in 1856, the *city of Beloit* was created. It embraces a part of the territory which before constituted the *town of Beloit*. This act provides:

"That all principal and interest upon all bonds which have heretofore been issued by *the town of Beloit* for railroad stock or other purposes, shall be paid, when the same or any portion thereof shall fall due, *by the city* and *town of Beloit*, in the same proportions as if the said city and town were not dissolved."

This provision was re-enacted in 1857.

It is averred that the *city* and *town* ought respectively to pay the proportions set forth—of the judgments—with interest from their several dates. The prayer is for general relief. The appellee demurred. The court sustained the demurrer, and dismissed the bill. This appeal was thereupon taken.

The two corporations are as separate and distinct as if the territories they embrace, respectively, had never been united. It is obvious that, without a legislative provision to that effect, *the city* would not be answerable at law for the debts of *the town*, incurred before the former was created. Whether,

* Tayloe v. Insurance Company, 9 Howard, 390.

but for the statute, the city there would have been chargeable in equity, it is not necessary to consider. The statute is conclusive as to a liability, to be enforced in some form of procedure. The only question before us is, whether there is a remedy in equity. It may be, as suggested by the counsel for the appellant, that an action would lie upon the statute. It is also possible that a proper case for a writ of *mandamus* might be made. But these inquiries are only material as bearing upon the question whether there is an adequate remedy at law. If so, a suit in equity cannot be maintained. To have this effect, the remedy at law "must be as plain, adequate, and complete," and "as practical and efficient to the ends of justice, and to its prompt administration, as the remedy in equity."* When the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial by jury.† The objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel.‡ The provision upon the subject in the sixteenth section of the Judiciary Act of 1789, was only declaratory of the pre-existing rule.

In the case before us the adjustment of the amount to be paid by the city, will depend upon accounts and computations founded upon the proper assessment rolls. In order to bind the town, it is necessary that it should be made a party. This cannot be done in proceedings at law. If the town should be compelled to pay the entire amount, the right is given by the statute to recover back the proportion for which the city is liable. This would involve circuity of litigation. The remedy at law is, therefore, neither plain nor adequate.

The question, whether a bill in equity will lie, is disembarrassed of this objection.

The authority to tax for the payment of municipal liabili-

* Boyce v. Grundy, 3 Peters, 215. † Hipp v. Babin, 19 Howard, 278.
‡ Fowle v. Lawrason, 5 Peters, 496; Dade v. Irwin, 2 Howard, 383.

ties; in cases like this, is in the nature of a trust.* The jurisdiction of a court of equity to interfere in all cases involving such an ingredient, is too clear to require any citation of authorities. It rests upon an elementary principle of equity jurisprudence.

"The power is reserved to a court of equity to act upon a principle often above-mentioned, namely, that whenever there is a right it ought to be made effectual."† Where there is a right which the common law, from any imperfection, cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy.‡

The decree is REVERSED. A mandate will be sent to the Circuit Court directing that the demurrer be overruled, and the cause proceeded in according to the principles of equity and the rules of equity practice.

BELOIT v. MORGAN.

1. A judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on a question of the validity of the issue on a suit brought by the same creditor against the same town, on other bonds, another part of the same issue; the parties being identical, and all objections taken by the town in the second suit having been open to be taken by it in the former one.
2. A legislative enactment created the city of Beloit, carving it out of territory previously covered by the town of Beloit only. The statute enacted thus:

> "All principal and interest upon all bonds which have heretofore been issued by the town of Beloit, for railroad stock or other purposes, shall be paid when the same, or any portion of the same, shall fall due, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved, such proportions to be apportioned," &c.

Held, that this made bonds issued by the town valid, assuming that previously to the act they were not so.

APPEAL from the Circuit Court for Wisconsin.

The legislature of Wisconsin, by act of 1853, authorized

* Von Hoffman v. The City of Quincy, 4 Wallace, 555.
† 1 Kaime's Principles of Equity, 8.
‡ Quick v. Stuyvesant, 2 Paige, 92.

the supervisors of the town of Beloit to subscribe to the capital stock of a certain railroad company, and to pay for the same in the bonds of the town, payable at the expiration of a term named, and with a rate of interest specified.

The supervisors, professing to execute the authority so conferred, did subscribe to the stock of a certain railroad company and issued bonds; of many of which one Morgan became the holder, *bonâ fide.*

Whether the bonds were issued pursuant to the authority which the statute gave to the supervisors, soon became a matter of controversy between the holders of them and the authorities of Beloit. These last asserted that they were not so issued, but were made without any legal authority; were in violation of the act of the legislature, and constituted a corrupt and usurious contract. They would accordingly pay nothing on the bonds.

In this state of things the legislature of Wisconsin, in 1856, created the city of Beloit; carving it out of territory which constituted the former *town* of Beloit. The charter of the new city provided thus:

"All principal and interest upon all bonds which have heretofore been issued by the town of Beloit for railroad stock or other purposes, when the same or any portion thereof shall fall due, SHALL be paid by the city and town of Beloit in the same proportions as if said town and city were not dissolved."

This provision was re-enacted in 1857, in an act amending the charter of the city.

With this act in force, Morgan brought suit at law for the interest of some of his bonds, against the town of Beloit, and on the 9th of January, 1861, obtained judgment against it.

He now also brought other suits against the town, on other of the bonds, not the same specific instruments, of course, as those on which he had obtained judgment, but part of the same issue, and a suit on which involved the same questions as did the suit on those on which he had already recovered.

Thereupon the town of Beloit filed a bill, the bill below, in the Circuit Court for Wisconsin, to enjoin the proceedings at law, and to compel a surrender of the bonds. The answer set up,

1. By way of estoppel, the judgment of 9th January, 1861, on certain of the bonds, as conclusive of the validity of the whole issue, and

2. The act of 1856 and its re-enactment of 1857, and alleged that it was the intention of the legislature to provide by those acts that the bonds in question should be paid; and that they were a legislative ratification of the bonds, with effect to cure any irregularity or want of authority.

The court below dismissed the bill. Appeal accordingly.

Messrs. Palmer and Ryan, for the appellant; Mr. Carpenter, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The bonds and coupons to which this litigation relates were issued under the same statute of Wisconsin, and for the same purpose, as those involved in the preceding case, just decided. The object of the bill is to enjoin the appellee from proceeding in the suits at law which he has instituted upon a part of the securities in his hands; and to have those and all others belonging to him, delivered up and cancelled. The court below heard and dismissed the case. It is brought here by this appeal for re-examination.

Numerous objections have been made to the validity of the bonds.

The argument on both sides has been learned and elaborate. The view which we have taken of the case will render it necessary to consider but two of the points to which our attention has been called.

I. On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this

case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject-matter, though the *res* itself may be different.

An apt illustration of this principle is found in *Gardner* v. *Buckbee*.* Gardner bought a vessel from Buckbee, and gave two notes for the purchase-money. Buckbee sued him upon one of the notes in the Marine Court. Gardner set up as a defence, fraud in the sale and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the City of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. *Bouchaud* v. *Dias*,† *Doty* v. *Brown*,‡ and *Babcock* v. *Camp*,§ are to the same effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time.‖ But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defence which might have been, but were not, presented.

In *Henderson* v. *Henderson*,¶ the Vice-Chancellor said: "In trying this question, I believe I state the rule of the court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special

* 3 Cowen, 120.

† 3 Denio, 238.

‡ 4 Comstock, 71.

§ 12 Ohio State, 11.

‖ Ferrer's Case, 6 Reports, 8; Hutchin v. Campbell, 2 W. Blackstone, 831; Duchess of Kingston's Case, 2 Smith's Leading Cases, 656; Aurora City v. West, *supra*, 82.

¶ 3 Hare, 115. See also, Birckhead v. Brown, 5 Sandford's Superior Court, 135.

circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

A party can no more split up defences than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction.* The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them. Nothing is disclosed in the case which affects this condition of things.

II. *The city of Beloit* was chartered by the legislature of Wisconsin in 1856. It embraces a part of the territory which previously belonged to the *town of Beloit.* In the seventeenth section of the charter it is enacted that "all principal and interest upon all bonds which have heretofore been issued by the *town of Beloit for railroad stock or other purposes*, when the same or any portion thereof shall fall due, shall be paid by *the city and town of Beloit* in the same proportions as if said *town and city* were not dissolved," &c.

This provision was re-enacted in 1857 in an act amending the charter of the city. No bonds were issued in payment for railroad stock but those to a part of which this controversy relates. The language used by the legislature is clear and explicit. No gloss can raise a doubt as to its meaning. It distinctly affirms, and the affirmation is repeated, that the bonds shall be paid.

The only point to be considered is the effect of this pro-

* Bendernagle v. Cocks, 19 Wendell, 207.

vision. That is not an open question in this court. Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the legislature is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution.* The same principle has been applied in the courts of the States.† This court has repeatedly recognized the validity of private and curative statutes, and given them full effect, where the interests of private individuals were alone concerned, and were largely involved and affected.‡ The earlier and more important of these authorities are so well known to the profession and are so often referred to, that it would be waste of time to comment upon them. We hold this objection also fatal to the appellant's case.

Several other important propositions have been discussed by the learned counsel for the appellee. They have not been considered, and we express no opinion in regard to them.

DECREE AFFIRMED.

THE BELFAST.

1. In all cases where a maritime lien arises, the original jurisdiction to enforce it by a proceeding *in rem*, is exclusive in the District Courts of the United States, as provided by the ninth section of the Judiciary Act of 1789.
2. State legislatures have no authority to create maritime liens; nor can they confer jurisdiction upon a State court, to enforce such a lien by a suit or proceeding *in rem*, as practised in admiralty courts.
3. Upon an ordinary contract of affreightment, the lien of the shipper is a maritime lien; and a proceeding *in rem*, to enforce it, is within the ex-

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* Gelpcke *v.* Dubuque, 1 Wallace, 220; Thomson *v.* Lee County, 3 Id. 327.

† Wilson *v.* Hardesty, 1 Maryland Ch. Decisions, 66; Shaw *v.* Norfolk Co. R. R. Co., 5 Gray, 180.

‡ Satterlee *v.* Matthewson, 2 Peters, 380; Wilkinson *v.* Leland, Id. 627; Leland *v.* Wilkinson, 10 Id. 294; Watson *v.* Mercer, 8 Id. 88; Charles River Bridge *v.* Warren Bridge, 11 Id. 420; Stanley *v.* Colt, 5 Wallace, 119; Croxall *v.* Shererd, Id. 268.

clusive original cognizance of the District Courts of the United States, albeit the contract be for transportation between ports and places within the same State, and all the parties be citizens of the same State, provided only that such contract be for transportation upon navigable waters to which the general jurisdiction of the admiralty extends.

4. The "saving," in the ninth section of the Judiciary Act, "to suitors, in all cases, of the right of a common law remedy, where the common law is competent to give it," does not authorize a proceeding *in rem*, to enforce a maritime lien, in a common law court, whether State or Federal. Common law remedies are not applicable to enforce such a lien, but are suits *in personam*, though such suits, under special statutes, may be commenced by attachment of the property of the debtor. Proceedings in a suit at common law, on a contract of affreightment, are the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. The judgment in such a case is not against the vessel, as the offending thing, but against the parties who have violated their contract; and can only affect the vessel so far as the defendants may have property therein.
5. These principles applied to the provision of the statute of 7th October, 1864, of the State of Alabama, under which contracts of affreightment are authorized to be enforced *in rem* through courts of the State, by proceedings, the same in form, as those used in courts of admiralty of the United States; and the statute held unconstitutional and void.

ERROR to the Supreme Court of Alabama.

The case was thus: The Constitution ordains that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the ninth section of the Judiciary Act of 1789, provides that the District Courts of the United States

"Shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . *saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it.*"

In this state of Federal law, fundamental and statutory, the State of Alabama, by enactments, entitled "PROCEEDINGS IN ADMIRALTY,"* provided that there should be a lien on all vessels for work and materials done or furnished, and for all debts contracted by the master, owner or consignee,

* Code, §§ 2692, 2708.

and for the wages of the officers, crew, &c., in preference to other debts due from the owners thereof. By the terms of the code, the lien is to be asserted by filing a complaint in any county in which the vessel may be found, stating the amount and nature of the claim, and praying a seizure of the vessel. Thereupon the clerk is to issue a writ commanding the sheriff to seize the vessel, her tackle, apparel and furniture. At any time before judgment, the master, owner or other persons may release the vessel by entering into bond in double the amount of the claim, stipulating to pay the amount of the judgment. Any number of persons may unite in the same complaint, and if more than one complaint be filed the court must consolidate them, and render but one judgment against the vessel, which is to be considered several as to each complainant. If a stipulation be entered into, the stipulators are defendants. If none, the court must render a judgment *ex parte* condemning the boat, tackle, &c., to be sold in satisfaction of the claim; and the affidavit of complainant is made presumptive evidence of the justice of the demand.

Finally, the code provides that, "unless where otherwise provided in this chapter, the proceedings to enforce the lien shall be the same as in the *courts of admiralty* of the United States, *but either party may have any question of fact decided by a jury, upon an issue* made up under direction of the court."

By the act of 7th October, 1864, "to amend the *admiralty laws* of the State," these provisions are extended to the contract of *affreightment.*

Under this statute, Boone & Co. filed their libel, March 30, 1866, in the *City Court of Mobile*, claiming $5800 for the loss of certain bales of cotton, shipped to them from Vienna, *in the State of Alabama*, to Mobile, *in the same State*, and prayed "*process in admiralty*" for the seizure of the steamboat Belfast.

In the same court a libel was also filed by J. & S. Steers, claiming compensation for other bales, shipped by them from Columbus, *Mississippi*, to Mobile, in *Alabama*, already mentioned. And a libel by Watson & Co. claiming it for cotton shipped by them, from and to the same points.

Statement of the case.

All the navigation which was the subject of the case, was upon the Tombigbee River, navigable water of the United States.

Under these several libels, the sheriff, by virtue of writs of seizure, took the steamer into possession, and posted his monitions, and the causes, under the statute, were consolidated and heard together. The answer, applicable to the three cases alike, set forth that the steamer was duly enrolled and licensed, in pursuance of laws of the United States, and that on the 15th January, 1866, she was regularly cleared at Mobile, Alabama, for Columbus, Mississippi, and that on her downward trip the cotton claimed was lost, and therefore, that the City Court had *no jurisdiction*.

A decree was rendered on 28th July, for the three libellants. Appeal was taken to the Supreme Court of Alabama, where one assignment of errors was: "That the City Court erred in overruling the protest to the jurisdiction." The decree of the City Court was, however, affirmed by the Supreme Court; and deciding, as that court thus did, in favor of the validity of a statute of a State drawn in question on the ground of its being repugnant to the laws of the United States, the case was brought here under the twenty-fifth section of the Judiciary Act.

Not much contesting the point that if the court had no jurisdiction in the two cases where the carriage was not wholly within one State no agreement below could authorize what it did about these two (jurisdiction being of course to be conferred by the law alone), the matter of debate was reduced, here, chiefly to the first case, that, namely, of Boone & Co., where the whole carriage was within the State of Alabama, and to the question of constitutional law arising upon *it*, to wit:

Whether the contract, made as it was, for the transportation of goods from one place to another, both in the same State, and without the goods being carried *in transitu*, into or through any other State or foreign dominion, was a contract which could be enforced by a proceeding in admiralty in the Federal courts alone?

If the State court had no jurisdiction in that case, *a fortiori*, it could have none in the two others.

Mr. P. Phillips, for the appellant:

It is matter of universal knowledge, that the admiralty jurisdiction of the Federal courts has undergone several changes since the establishment of this government, and we need not discuss at all the familiar cases of *The Thomas Jefferson*,* *Waring* v. *Clarke*,† *The Lexington*,‡ *The Genesee Chief*,§ and some others of a past day. Whether they be all reconcilable or not, is unimportant now. The only thing important to be inquired into by us now, is the judgment of this court, as settled in its *most recent* decisions, determining the character and limit of the admiralty jurisdiction. And we have here two leading cases on this point. In *The Moses Taylor*,‖ the action was on a contract for personal transportation. The court held that this was a maritime contract; that it was not distinguishable from a contract for the *transportation of freight*, and that the breach of either is the appropriate subject of admiralty jurisdiction.

And, further, that the clause of the Judiciary Act, which saves to suitors a common law remedy, does not save a proceeding *in rem*, as used in the admiralty courts. Such a proceeding not being a remedy afforded by the common law.

In *The Hine* v. *Trevor*,¶ the action was for a collision occurring on the Mississippi, near St. Louis. The record "raised distinctly the question how far the jurisdiction in admiralty was exclusive, and to what extent the State courts could exercise a concurrent jurisdiction," and, owing to the importance of the principles involved, the "case was held under advisement for some time, in order that every consideration which could influence the result might be deliberately weighed." The court affirm the judgment given in *The Moses Taylor*, and reassert the doctrine declared in the case of *The Genesee Chief*, that the "principles of admiralty ju-

* 10 Wheaton, 428. † 5 Howard, 441. ‡ 6 Id. 390.
§ 12 Id. 457. ‖ 4 Wallace, 424. ¶ Ib. 556.

risdiction, as conferred on the Federal courts by the Constitution, extend *wherever ships float*, and *navigation successfully aids commerce, whether internal or external.*" It further declares that the grant of this power under the act of 1789, is exclusive not only of all other Federal courts, but of all other State courts, and, therefore, State statutes which confer upon State courts a remedy for marine torts *and marine contracts*, by proceeding strictly *in rem*, are void.

The provisions of the Alabama code are those of the acts quoted in the above recent cases, and are subject to the same condemnation. Judgment, therefore, must be reversed.

Mr. Carlisle, contra:

1. The case arose in, and concerned alone, *the internal commerce of the State of Alabama*, and therefore it was one with which the laws of that State only could deal. It lay wholly beyond the region of Federal powers. And it is quite unimportant in what form, or by what system of pleading and evidence, the State might provide a remedy in such a case. The mere form cannot affect the substance. If the power exercised be one belonging to the State, and not to the Federal government, it does not concern the Federal government whether it be exercised in one form or another; or whether the proceeding be called a libel in admiralty, a bill in equity, or an action at common law; whether given by modern statute, or to be found in the Year Books.*

2. The particular remedy given by the Alabama statute, and adopted in these cases, is within the saving in the ninth section of the Judiciary Act. What is meant, as well in the act of 1789, as in the Constitution itself, by the "*common law*," has been settled by this court. The language of the seventh amendment is:

"In *suits at common law*, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

* Gibbons v. Ogden, 9 Wheaton, 204.

The language of the ninth section, and that just quoted, is obviously used in the same sense. Now in *Parsons* v. *Bedford*,* the court say:

"By 'common law,' the framers of the amendment meant what the Constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in admiralty, a mixture of public law and of maritime law and equity were often found in the same suit. Probably there were few, if any, States in the Union in which some new legal remedies, differing from the old common law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings *in cases of partition and foreign and domestic attachment* might be cited as examples variously adopted and modified."

To show that the case at bar is a "civil cause of admiralty and maritime jurisdiction," shows nothing to the purpose, if it also appear that there was a common law remedy at the option of the suitors, and that they elected that remedy. They are the very persons who under the statute had the right to do so.

It is not necessary to make a case one at common law, that the suit be begun by the service of process, or by actually bringing into court, in any other way, the party whose rights are to be affected by the proceeding. A defendant may be brought into court as well by seizing his property, and bringing it into court, under circumstances giving him plain and reasonable notice of the cause of its seizure. If the statute makes provision for his personal appearance, and a day is given to him in court, with the right of trial by jury, then it is as much a common law case as if it had begun by a

* 3 Peters, 446–7.

capias ad respondendum, instead of a seizure of his property. And, on the other hand, though the suit be begun by a capias, and proceeded in throughout according to the most exact forms of a common law suit in all things but one, to wit, *the trial by jury*, if that be denied, it is no true case at common law. It is this distinctive quality alone which the Constitution guarantees and preserves from all innovation. And there is no instance in this court in which, where the subject-matter was the adjudication of purely legal rights, and the right of the trial by jury has been "preserved," in which the case has been treated as other than a common law case, whether a concurrent remedy existed, either in admiralty or in equity, or not, and whatever may have been the mere *form* of the proceedings.

The Hine v. *Trevor* is no exception to this rule. There, as the report shows, there was, and could be, *no jury trial.* The Iowa statute, on which that case rested, made no provision to protect the owner of the vessel, and afforded him no opportunity, by his personal appearance, of converting the proceeding into a common law trial by jury. The proceeding was begun, continued, and ended, and could only be so, as a civil law proceeding *in rem.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Persons furnishing materials or supplies for ships or vessels, within the State of Alabama, have a lien by the law of that State on the same for all debts contracted by the master, owner, or consignee thereof for the work done, and for the materials and supplies furnished, in preference to other debts due and owing from the owners of such ships or vessels. By the code of that State it is also provided, under the title, "proceedings in admiralty," that whenever any steamboat or other water-craft shall receive on board, as a common carrier, any goods or merchandise as freight, to be delivered at any specified place, and shall fail to deliver the same as directed in the bill of lading or other contract of shipment, the owner or consignee of such goods or merchandise shall have a lien on such boat or other water-craft

for his loss or damage, to be enforced in the same manner and subject to the rules and regulations prescribed in relation to similar liens for labor, materials, and supplies furnished to such steamboats or other water-craft, as described in the antecedent provision.*

Pursuant to those statutory rules and regulations of the State, the libel in this case was filed in the City Court of Mobile, and the libellants alleged that they, on the twenty-third of January, 1866, shipped on board the steamboat Belfast, then lying at Vienna in that State, one hundred bales of cotton, to be transported to Mobile, in the same State, and there to be delivered to certain consignees, they paying freight therefor at the rate of five dollars per bale, the dangers of the river excepted; that on the way down the river, below Vienna, twenty-nine bales of the cotton were lost, not by the dangers of the river, and were never delivered to the consignees, whereby the libellants suffered loss to the amount of five thousand eight hundred dollars. Introductory allegations of the libel, also, are the same as in a libel *in rem* in the District Courts of the United States; and in conclusion, the "libellants pray process in admiralty" against the steamer, "her tackle, apparel, and furniture," and that the same may be condemned to satisfy their damages and costs. Process was accordingly issued, commanding the sheriff to seize and take the steamer, &c., into his possession, and to hold the same until released by due course of law. Respondents appeared as claimants, and alleged that they were the owners of the steamer, and they admitted that the cotton was shipped on board at the time and place, and on the terms and for the purpose alleged in the libel; but they excepted to the jurisdiction of the court, and alleged that the steamer, at the time the cotton was shipped, was duly enrolled and licensed under the laws of the United States; that she was then and there regularly engaged in commerce and navigation between the city of Columbus, in the State of Mississippi, and the city of Mobile, in

* Revised Code, §§ 3127, 3142.

the State of Alabama, and that the cotton described in the libel was lost in her trip down the river from the former city to her port of destination. Defence of the respondents upon the merits was, that the steamer and cargo were captured by a band of robbers in the trip down the river, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States, and without any negligence or fault on the part of the officers and crew of the steamer. They also set up the defence, that it was agreed between the master and the shippers that the vessel should not be liable for the loss of the cotton, if it was captured by armed men during the voyage, without any negligence or fault on the part of the carrier. Libellants excepted to that part of the answer denying the jurisdiction of the court, as insufficient and invalid; and they also excepted to the defence, as pleaded, that the steamer was robbed of the cotton, as no bar to a recovery in the case, and the court sustained the views of the libellants in both particulars, and the respondents excepted to the respective rulings of the court.

Two other consignments of cotton were also on board the steamer at the time the alleged robbery occurred. Ninety bales were shipped by J. H. Steers & Company, at Columbus; and one hundred bales were shipped by John Watson & Company, at the same place. Both shipments were to be transported to the port of Mobile, and there to be delivered to certain consignees under a similar contract of affreightment as that alleged in the first case, except as to the price to be paid for the transportation. Steers & Company lost thirty-four bales of their shipment, and Watson & Company lost thirty bales, as alleged by the respective parties. Libels in the same form were also filed by those parties about the same time, in the same court, and the owners of the steamer appeared in each case as claimants, and pleaded the same defences in the three cases.

Evidence was introduced by the respective libellants, proving that the entire cotton lost, and not delivered, was of the value of four thousand dollars. They also introduced

the several bills of lading, and the respondents admitted the shipments as alleged in the respective libels. On the other hand, the libellants admitted that the steamer was robbed, as alleged in the answer, and without any neglect or fault of the owners of the steamer, or those in charge of her navigation.

Agreement of the parties, as stated in the bill of exceptions, was that the three cases should be tried together, and they were all submitted at the same time and upon the same issues. Finding of the court was that the whole loss in the three cases was four thousand dollars, and of that sum the decree of the court allowed one thousand dollars to the libellants in the first case, fourteen hundred dollars to the libellants in the second case, and sixteen hundred dollars to the libellants in the third case, with costs to the prevailing party.

Exceptions were seasonably tendered by the respondents to the rulings and decision of the court, and the exceptions were duly allowed by the court. Appeals were then taken by the respondents to the Supreme Court of the State, where the objections to the jurisdiction of the court were renewed in the formal assignment of errors. The parties were heard, but the court overruled the objections to the jurisdiction of the court, and affirmed the respective decrees rendered in the subordinate court. Writs of error were then sued out under the twenty-fifth section of the Judiciary Act, and the respective causes were removed into this court.

Jurisdiction of this court to re-examine the questions presented in the pleadings may be assumed as existing without discussion, as it is conceded that the questions are the same as were raised and decided in the State courts, and it is not controverted that the questions are such as may be re-examined here under the twenty-fifth section of the Judiciary Act.

Theory of the respondents is, that the respective libels were libels *in rem* to enforce a maritime lien in favor of the shippers of the cotton, under contracts of affreightment for the transportation of goods and merchandise from one port

to another upon navigable waters, and that the State courts have no jurisdiction to employ such a process to enforce such a lien in any case; that the jurisdiction to enforce a maritime lien by a proceeding *in rem* is exclusively vested in the Federal courts by the Constitution of the United States and the laws of Congress. But the libellants controvert that proposition, and insist that the State courts have concurrent jurisdiction in these cases under that clause in the ninth section of the Judiciary Act, which saves "to suitors in all cases the right of a common law remedy where the common law is competent to give it."*

2. They also contend, if their first proposition is not sustained, that inasmuch as the three cases were heard together, under an agreement that they should be tried upon the same issues, and that the libel filed by W. C. Boon & Company, as stated in the bill of exceptions, was selected as the case to be tried in the court where the suits were commenced, the rights of the parties in the other two cases must abide the decision of this court in that case.

Assuming that to be so, then they contend that the State court had jurisdiction in the first case, because the contract of affreightment was for the transportation of goods and merchandise between ports and places in the same State. Impliedly, the argument admits that the rule is otherwise where the contract is for the transportation of goods and merchandise between ports and places in *different* States; but the proposition is, that where the contract is between citizens of the same State, for the transportation of goods and merchandise from one port to another in the same State, the case is not one within the jurisdiction of the admiralty courts of the United States, unless it becomes necessary, in the course of the voyage, to carry the goods or merchandise into or through some *other* State or foreign dominion.

Obviously the questions presented are questions of very great importance, as affecting the construction of the Federal Constitution, and the rights and remedies of the citizens

* 1 Stat. at Large, 77.

engaged in an important and lucrative branch of commerce and navigation.

Judicial power to hear and determine controversies in admiralty, like other judicial power, was conferred upon the government of the United States by the Federal Constitution, and, by the express terms of the instrument, it extends to all cases of admiralty and maritime jurisdiction; which, doubtless, must be held to mean all such cases of a maritime character as were cognizable in the admiralty courts of the States at the time the Constitution was adopted.*

Admiralty jurisdiction, as exercised in the Federal courts, is not restricted to the subjects cognizable in the English courts of admiralty at the date of the Revolution, nor is it as extensive as that exercised by the continental courts, organized under, and governed by, the principles of the civil law.†

Best guides as to the extent of the admiralty jurisdiction of the Federal courts, are the Constitution of the United States, the laws of Congress, and the decisions of this court.

Two of the contracts of affreightment in these cases, were for the transportation of cotton between ports and places in different States; but as the contract alleged in the libel filed in the first case, was for the transportation of cotton from one port to another, in the same State, it becomes necessary to determine, irrespective of the questions presented in the other cases, whether such a contract is cognizable in the admiralty courts of the United States, because, if not, the libellants, in any view of the case, must prevail, as there would be, in that state of the case, no jurisdiction in this court to re-examine the decision of the State court in that case.

Much controversy has existed as to the true extent of the admiralty and maritime jurisdiction of the Federal courts, but great aid will be derived in the solution of this question by an examination of the decisions of this court at different periods since the judicial system of the United States was organized.

* Waring et al. *v.* Clarke, 5 Howard, 454.

† Bags of Linseed, 1 Black, 108.

Opinion of the court.

Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures.

(1.) Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty.*

(2.) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts.

Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable, are not maritime any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction, as defined by law.†

Such jurisdiction, whether of torts or of contracts, was, and still is, restricted in the parent country to tide-waters, as they have no large fresh-water lakes or fresh-water rivers which are navigable. Waters where the tide did not ebb and flow, were regarded in that country as not within the admiralty and maritime jurisdiction; and such was the decision of this court in the case of *The Jefferson*,‡ and the rule established in that case was followed for more than a quarter of a century.

Attempt was subsequently made to restrict the jurisdiction of the admiralty courts in torts to cases arising on the high seas, but this court held that it extended to all waters within the ebb and flow of the tide, though *infra corpus comitatus*, and as far up the rivers emptying into the sea or bays and arms of the sea, as the tide ebbed and flowed. And that rule, ever after it was promulgated, prevailed, and was universally applied by the District Courts in cases of collision.§

Application of that rule was made by the Federal courts

* 1 Conklin's Admiralty, 19.

† The Commerce, 1 Black, 579; 2 Story on the Constitution (8d ed.), §§ 1666–1669.

‡ 10 Wheaton, 428. § Waring et al. *v.* Clarke, 5 Howard, 549.

in collision cases arising upon the Hudson, the Penobscot, the Kennebec, the Merrimac, the Alabama, and many other rivers navigable only between ports and places in one State.

Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, was conferred upon the District Courts by the ninth section of the Judiciary Act, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas.

Remedies for marine torts, it is conceded, may be sought in the admiralty courts under that provision, although committed within the body of a county, but it is denied that redress can be obtained in the admiralty for the breach of a contract of affreightment in a case where the port of shipment and the port of destination are in the same State.

Repeated attempts were made at an early day to induce the court to hold that seizures on water were not cases of admiralty cognizance, and that contracts of affreightment were exclusively cognizable in the courts of common law; but this court refused to adopt either proposition, and held that the entire admiralty power of the Constitution was lodged in the Federal courts, and that Congress intended by the ninth section of the Judiciary Act to invest the District Courts with that power as courts of original jurisdiction; that the phrase, "exclusive original cognizance," was used for that purpose, and was intended to be exclusive of the State courts as well as the other Federal courts.*

When the case of *The Lexington* was decided, it was still supposed that the admiralty jurisdiction was limited to waters affected by the ebb and flow of the tide, but the case is a decisive authority to show that the jurisdiction of the admiralty, in matters of contract, was understood to be coextensive with the jurisdiction in cases of marine torts.

* The Lexington, 6 Howard, 890; The Vengeance, 3 Dallas, 297; The Betsey, 4 Cranch, 448; The Samuel, 1 Wheaton, 9; The Octavia, Ib. 20.

Opinion of the court.

Subject-matter of the suit in the case of *Waring et al.* v. *Clarke*, was that of a collision, and the subject-matter in the case of *The Lexington* was a loss of specie *in transitu*, under a contract of affreightment. Viewed in any light, those two cases settle the question that where the voyage and transportation are over tide-waters, the jurisdiction of the admiralty is the same in matters in maritime contracts as in marine torts.

Such was the state of the law upon the subject, as decided by this court, when the case of *The Genesee Chief** was brought here for re-examination; and in that case this court held that the jurisdiction in admiralty depended, not upon the ebb and flow of the tide, but upon the navigable character of the water; that if the water was navigable, it was deemed to be public, and if public, that it was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

Prior to that decision, the Western lakes and navigable rivers of the United States, above tide-waters, were not supposed to be waters within the admiralty and maritime jurisdiction of the Federal courts. Strange as that proposition may now appear to one familiar with the provision contained in the ninth section of the Judiciary Act, it is nevertheless true that the rule restricting admiralty jurisdiction to tide-waters had prevailed from the organization of the judicial system to that date, but the effect of that decision was to dispel that error and place the admiralty jurisdiction upon its true constitutional and legal basis, as defined in the Constitution of the United States and the laws of Congress.

Subsequent decision of this court, in the case of *The Magnolia*, was, that the admiralty jurisdiction of the Federal courts extends to cases of collision upon navigable waters, although the place of the collision may be within the body of a county and above the ebb and flow of the tide; and this court also held in that case that the District Courts exercise jurisdiction over fresh-water rivers, "navigable from the

* 12 Howard, 457.

sea," by virtue of the ninth section of the Judiciary Act, and not as conferred by the act of the 26th of February, 1845, which is applicable only to the "lakes, and navigable waters connecting said lakes."*

Direct proposition of the respondents in the case of *The Commerce*† was, that the case before the court, which was a collision on the Hudson River, was not a case cognizable in the admiralty, because it did not appear that either of the vessels was engaged in foreign commerce, or in commerce among the several States; but the court held that judicial power in all cases of admiralty and maritime jurisdiction was conferred by the Constitution, and that in cases of tort the question of jurisdiction was wholly unaffected by the considerations suggested in that proposition; and we reaffirm the rule there laid down, that locality is the true test of admiralty cognizance in all cases of marine torts; that if it appears, as in cases of collision, depredations upon property, illegal dispossession of ships, or seizures for the violation of the revenue laws, that the wrongful act was committed on navigable waters, within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty.‡

Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself.

Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants.§

Congress may regulate commerce with foreign nations

* The Magnolia, 20 Howard, 296; 5 Stat. at Large, 516.

† 1 Black, 578.

‡ 2 Story on the Constitution, § 1669.

§ The Genesee Chief, 12 Howard, 452.

and among the several States, but the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal government by the Constitution, and Congress cannot enlarge it, not even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations.*

Remarks, it is conceded, are found in the opinion of the court in the case of *Allen et al.* v. *Newberry*,† inconsistent with these views; but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the Western lakes, where the jurisdiction in admiralty is restricted, by an act of Congress, to steamboats and other vessels . . . . employed in the business of commerce and navigation, between ports and places in different States and Territories.‡

No such restrictions are contained in the ninth section of the Judiciary Act, and consequently those remarks, as applied to a case falling within that provision, must be regarded as incorrect.

Such a rule, if applied to the commerce and navigation of the Atlantic coast, would produce incalculable mischief, as the vessels in many cases, even in voyages from one port in a State to another port in the same State, are obliged, in the course of the voyage, to go outside of any particular State, and it would not be difficult to give examples where more than half the voyage is necessarily upon the high seas. Unless the admiralty has jurisdiction, in such a case, to enforce the maritime lien, in case of a collision or jettison, it is difficult to see to what forum the injured party can resort for redress. Piracy, it is said, is justiciable everywhere, but it cannot be admitted that maritime torts are justiciable nowhere.

Unable to deny that the admiralty has jurisdiction over marine torts, though the voyage is between ports and places in the same State, the advocates of the more restricted juris-

* The St. Lawrence, 1 Black, 526.

† 21 Howard, 245.

‡ The Hine v. Trevor, 4 Wallace, 555.

diction over maritime contracts set up a distinction, and contend that the admiralty jurisdiction over such contracts is limited by the power granted to Congress to regulate commerce. Reference may be made to the case of *Maguire* v. *Card*,* as one where that distinction was adopted; but the decisive answer to that case, and the one preceding it in the same volume, will be found in the later cases already referred to, and in the case of *The Mary Washington*,† where the opinion was given by the present Chief Justice. All three of the cases, therefore, as well the case of W. C. Boon & Company as the other two, are cases within the admiralty and maritime jurisdiction of the Federal courts.

II. Suppose that to be so, then, it is contended by the libellants, in the second place, that all three of the original actions were well brought in the State court as a court of concurrent jurisdiction with the District Courts of the United States in admiralty, and that the particular remedy, given by the statute of the State, and adopted in these cases, is within the true intent and meaning of the saving clause in the ninth section of the Judiciary Act.

Wherever a maritime lien arises the injured party may pursue his remedy, whether for a breach of a maritime contract or for a marine tort, by a suit *in rem*, or by a suit *in personam*, at his election. Attention will be called to three classes of cases only as examples to illustrate that proposition; but many more might be given to the same effect.

Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfilment of the contract of the carrier, that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment.‡

Owners of vessels damaged by collision, occasioned without fault on their part, and wholly through the fault of those

* 21 Howard, 249. † 14 American Law Register, 692.

‡ The Bird of Paradise, 5 Wallace, 545; The Eddy, Ib. 481; Bags of Linseed, 1 Black, 112; Maude & Pollock on Shipping, 254.

in charge of the colliding vessel, also have a maritime lien on the vessel in fault as a security for such damages as may be awarded to them in the admiralty for the injury thereby caused to their vessel, and they may proceed *in rem* to enforce their claim for the damages, or they may waive the lien and bring their suit *in personam* against the master or owners of the vessel.*

Material-men, also, who furnish materials or supplies for a vessel in a foreign port, or in a port other than a port of the State where the vessel belongs, have a maritime lien on the vessel as a security for the payment of the price of all such materials and supplies. They have such a lien because, upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel, and consequently they are entitled to proceed *in rem* in the admiralty court to enforce the lien, but they are not compelled to do so, as they may waive the lien and bring their suit *in personam* against the master or owners, as they are also liable as well as the vessel.†

None of these principles are controverted, but the libellants contend that the State courts have concurrent jurisdiction to afford the parties the same remedies in all such cases. No warrant for that proposition, however, is found in the ninth section of the Judiciary Act, nor in any other part of that fundamental regulation of our judicial system. On the contrary, the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is, by the very terms of that section, conferred upon the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." Nothing is said about a concurrent jurisdiction in a State court or in any other court, and it is quite clear that in all cases where the parties are citizens of different States, the injured party may pursue the common law remedy here

* Sturgis *v.* Boyer et al., 24 Howard, 117; Chamberlain *v.* Ward, 21 Id. 558.

† The St. Lawrence, 1 Black, 529; Manro *v.* Almeida, 10 Wheaton, 478; The Reindeer, 2 Wallace, 384; The General Smith, 4 Wheaton, 438.

described and saved, in the Circuit Court of the district as well as in the State courts.

Original cognizance is exclusive in the District Courts, except that the suitor may, if he sees fit, elect to pursue a common law remedy in the State courts or in the Circuit Court, as before explained, in all cases where such a remedy is applicable. Common law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts.*

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practised in the admiralty courts. Observe the language of the saving clause under consideration. It is to suitors, and not to the State courts, nor to the Circuit Courts of the United States. Examined carefully it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case.

Undoubtedly most common law remedies in cases of contract and tort, as given in common law courts, and suits *in personam* in the admiralty courts, bear a strong resemblance to each other, and it is not, perhaps, inaccurate to regard the two jurisdictions in that behalf as concurrent, but there is no form of action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy.

* The Moses Taylor, 4 Wallace, 411.

Consignees or shippers may proceed in the admiralty *in rem* against the vessel to enforce their maritime lien, or they may waive that lien and still proceed in the admiralty *in personam* against the owners of the vessel to recover damages for the non-fulfilment of the contract, or they may elect to bring a common action against the owners to recover damages, as in other cases for the breach of a contract to be executed on land.

Proceedings in a suit at common law on a contract of affreightment are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. When properly brought, the suit is against the owners of the vessel, and in States where there are attachment laws the plaintiff may attach any property not exempted from execution, belonging to the defendants.

Liability of the owners of the vessel under the contract being the foundation of the suit, nothing can finally be held under the attachment except the interest of the owners in the vessel, because the vessel is held under the attachment as the property of the defendants, and not as the offending thing, as in the case of a proceeding *in rem* to enforce a maritime lien. Attachment in such suits may be of the property of non-residents or of defendants absent from the State, as in suits on contracts not maritime, and the same rules apply in respect to the service of process and notice to the defendants.

Applying these rules to the cases before the court, it is obvious that the jurisdiction exercised by the State court was of the precise character which is exclusive in the District Courts of the United States sitting in admiralty. Authority does not exist in the State courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien.

Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a

regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.*

Contracts for shipbuilding are held not to be maritime contracts, and, of course, they fall within the same category, but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District Courts of the United States, as provided in the ninth section of the Judiciary Act.†

Respective decrees REVERSED, and the several causes remanded, with instructions to

DISMISS THE RESPECTIVE LIBELS.

WHITE'S BANK *v.* SMITH.

1. Under the act of Congress of July 29th, 1850, enacting—

   "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs where such vessel is registered or enrolled,"

   a recording of a mortgage in the office of the collector of the home port of the vessel has the effect, by its own force and irrespective of any formalities required by a State statute to give effect to chattel mortgages, to give the mortgagee a preference over a subsequent purchaser or mortgagee.
2. The home port of the vessel is the port in the office of whose collector the bill of sale, mortgage, &c., should be recorded; not the port of last registry or enrolment when not such home port.
3. The act is constitutional.

ERROR to the Circuit Court for the Northern District of New York.

The case was this:

An act of Congress, "providing for the recording of con-

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* The General Smith, 4 Wheaton, 438; The St. Lawrence, 1 Black, 529.

† Ferry Company *v.* Beers, 20 Howard, 402.

veyances of vessels and for other purposes," and passed July 29th, 1850,* thus enacts:

"No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, *be recorded in the office of the collector of customs where such vessel is registered or enrolled.*"

And a statute of the State of New York thus enacts:

"Every mortgage of chattels which shall not be accompanied, &c., shall be *absolutely void* as against the creditors of the mortgagor, and as against *subsequent purchasers and mortgagees in good faith*, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this act."

The "succeeding section" above referred to directs where the mortgage shall be filed. And a third section proceeds:

"Every mortgage filed in pursuance of this act, shall *cease to be valid* as against the creditors of the person making the same, *or against subsequent mortgagees in good faith*, after the expiration of one year from the filing thereof, unless within, &c., a true copy of such mortgage shall be again filed in the office of the clerk or register aforesaid of the *town or city where the mortgagor shall then reside.*"

With these two acts, one of the United States and the other of the State of New York, in force, one Hoyt, then a resident of Buffalo, Erie County, New York, executed, on the 22d May, 1863, a mortgage to White's Bank, of Buffalo, upon the schooner Emmett, of which he was owner. This mortgage was recorded, on the 12th of the June following, *in the collector's office at Buffalo, where the Emmett was duly enrolled, and where, as just said, Hoyt, her owner, resided.* The mortgage was filed, also, in the office of the clerk of the county of Erie, on the 5th June, 1863, according to the re-

* 9 Stat. at Large, 440.

quirement of the above-quoted law of New York, *but it was not refiled at the end of a year.*

Subsequently to the date of this mortgage of Hoyt to White's Bank, the vessel became the property of one Zahn, residing at Sandusky, Ohio; and on the 2d June, 1865, he mortgaged her to one Smith. The mortgage to Smith was recorded in the collector's office, at the port of Sandusky, Ohio, on the 17th of June, 1865, where the Emmett was duly enrolled, and at which place, as above stated, the then owner, Zahn, resided. The vessel having been sold subsequently to the date of both the mortgages, under a paramount lien for seamen's wages, and a remnant of the proceeds of sale, after payment of such wages, remaining, but being insufficient to pay either mortgage, the question was, to which of the mortgages it should be applied,—to the first mortgage, that of the bank? or to the subsequent one, Smith's? Smith set up that the lien of the mortgage to White's Bank was lost on account of the omission to refile it in the clerk's office of Erie County at the end of the year, and this position it was which raised the material question in the case; the question, namely, whether or not the recording of the mortgage in the collector's office at Buffalo had the effect, *by its own force, and irrespective of the filing in the clerk's office*, to give a preference to it over any subsequent purchaser or mortgagee?

The court below decreed that the fund should be appropriated to Smith's mortgage; and White's Bank appealed.

Mr. Haddock, for the appellant, contended that the act of the legislature of New York, so far as it required chattel mortgages upon *vessels* to be recorded, was a regulation of commerce, and therefore repugnant to that clause of the Federal Constitution which provides that *Congress* shall have power to regulate commerce with foreign nations, and among the several States. In *Steamship Company* v. *Portwardens*,* where a statute of Louisiana, imposing a tax upon

* 6 Wallace, 31.

vessels, was declared repugnant to the Constitution of the United States, the court says: "The power to regulate commerce was given to Congress in comprehensive terms. It was thus given with the obvious intent to place that commerce beyond interruption or embarrassment, arising from the conflicting or hostile State regulations." So here the subject-matter, having been acted upon by Congress, was placed beyond the reach or control of the States.

Mr. Rogers, contra:

The act of Congress did not supersede the necessity of a compliance with the statute of New York. It is not repugnant to, nor in any manner in conflict with that law. There is no difficulty in complying with both. To regulate commerce was not the purpose of the State act; and if it does affect commerce, it does so only by acting *incidentally* on one of its instruments. But if the two acts are inconsistent, which should give way?

The act of Congress is, in some sort, a recording or registry act, having in view, apparently, the protection of the interests of *bonâ fide* purchasers, as well as those of the United States, in the enforcement of its revenue and navigation laws. In so far as it thus assumes to regulate the transfer of the title of parties in such property, is the act constitutional? Can Congress enter the domain of property and assume in all cases to regulate the transfers thereof? We submit that it cannot. The clause of the Constitution which gives to Congress power to "regulate commerce," contains nothing *in terms* giving to that body the power to enter the domain of private property, and to enact what shall be, and what shall not be, a valid transfer thereof. Nor does any such power arise from implication from the power actually given. The rights of property as well as of person are carefully left to the several States, which, according to the theory of the Constitution, were better fitted to regulate them properly than any general government could possibly be. An owner who obtains the enrolment of his vessel because he cannot otherwise engage her in commerce, cannot

be deemed thereby to resign his right to sell or dispose of her, by the observance of such formalities as the laws of his State alone prescribe.

If Congress have power to enact this registry law for the protection of creditors, purchasers, &c., simply because a ship is a vehicle of commerce, they have also the power to enact a similar law in relation to all locomotives, cars, wagons, sleighs, and other vehicles used in the carrying on of commerce between the States or with foreign nations; and in fact to regulate the transfer of title to all property which is the subject of commerce.

[A question was also made as to whether the record of the vessel under the act of Congress should be in the vessel's home port, or, as was decided by the Supreme Court of Massachusetts, in *Potter* v. *Irish*,* and afterwards by the Supreme Court of Maine, in *Chadwick* v. *Baker*,† in the port of the last registry or enrolment, though not the home port?]

Mr. Justice NELSON delivered the opinion of the court.

The act of Congress, July 29, 1850, on this subject, of the present case, is as follows:

"That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of customs, where such vessel is registered or enrolled."

The next section provides for recording these bills of sale, &c., and also certificates of discharge and cancellation in a proper book. No provision was made for any authentication of these instruments preparatory to their being recorded. They were received by the collector from the parties delivering them, and were recorded, with no proof of their verity, except from the execution of the same, as appeared on their face; and this, both as it respects the bills of sale, mortgages,

* 10 Gray, 416. † 54 Maine, 9.

&c., and the discharge and cancellation of the same. And the law thus stood for some fifteen years. On March 3, 1865, it was enacted that "no bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage, or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds."

Previous to this act of 1850, providing for the recording of bills of sale, mortgages, &c., of vessels, they were required to be filed, by the laws of many of the States, in the clerk's office, or some place of public deposit in the town or city where the vendor or mortgagor resided, in order to protect the interest of the vendee or mortgagee against subsequent *bonâ fide* purchasers or mortgagees. And this practice continued in many places after the passage of the act of 1850, for abundant caution, on account of a doubt as to the effect that would or might be given to it as a recording act, from the very imperfect provisions of the law. There can be no doubt, however, but that the system of recording these instruments in the collector's office, at the home port of the vessel, furnishes a much readier opportunity to persons dealing in this species of property, to obtain a knowledge of the condition of the title, than by the former mode under the State law. We say the home port, because it is quite apparent from the language of the act, "be recorded in the office of the collector of customs, where such vessel is registered or enrolled," means the permanent registry or enrolment, which is at the port, "at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of said ship or vessel usually resides. And the name of the said ship or vessel, and the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length," and, if found without such name and the name of the port, the owner is subject to a penalty of fifty dollars.*

* Act 31st December, 1792, § 8.

The same act provides for a temporary registry, when the owner acquires her in a different district from that in which he resides; but this is to enable him to bring the vessel within the home district or port, where she can obtain her permanent registry. The character of this temporary registry is expressed on the face of it, and is delivered up to the collector on the issuing of the permanent registry, whose duty it is to return it to the collector that granted it.*

So a registered vessel may be enrolled, or an enrolled vessel registered, on the master giving up to the collector the registry or enrolment, as the case may be; and if such vessel shall be in any other district than the one to which she belongs, the collector of such district, upon the master taking an oath that, according to his best knowledge and belief, the property remains as expressed in a registry or enrolment proposed to be given up, and on giving the bond required, shall make the exchanges above mentioned; but the collector to whom the registry or enrolment is given up, shall transmit the same to the Register of the Treasury, and the registry or enrolment granted in lieu thereof, shall, within ten days after the arrival of such vessel within the district to which she belongs, be delivered to the collector of said district, and be by him cancelled.†

This exchange of registry or enrolment may occur in any part of a voyage or voyages, and the temporary registry or enrolment continues till the vessel, in the regular course of her employment, arrives at the port to which she belongs, where she may again obtain a renewal of her permanent documentary title. As we have said, we think it apparent that the collector's office in the district in which this temporary registry or enrolment is made, is not the office contemplated by the act of 1850. The temporary papers are made in the office where the vessel happens to be at the time of the sale or exchange of the documentary title, and continues only till her arrival at the port to which she belongs. Her name, and the name of her home port, remains painted on

* Act 31st December, 1792, § 11. † 1 Stat. at Large, 288, § 3.

her stern, notwithstanding this temporary document, and satisfies the requirement of the act in that respect, and both continue until a new home port is acquired by a change of ownership, requiring a permanent registry or enrolment on account of the different residence of the owners, when the name of that port is substituted. And, confining the record to the home port, there is great propriety and convenience in requiring bills of sale, mortgages, &c., of the whole, or parts of a vessel, to be made matters of record in this office, as in the registries there are the names of all the owners under oath, together with their residences; and since the act of 1850, containing also the part or proportion of such vessel belonging to each owner (§ 5). And in this same section it is provided that, "in all bills of sale of vessels registered or enrolled, shall be set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing." And in this connection we may also mention, that in case of the sale of a vessel, which can only be to a citizen or citizens of the United States, and a new permanent registry becomes necessary, the former certificate of registry must be delivered to the collector to whom application is made for the new registry, to be transmitted by him to the Register of the Treasury to be cancelled; and in every such sale or transfer of a vessel, there shall be some instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of the former registry, otherwise the ship or vessel shall be incapable of being registered anew.* And as this bill of sale is recorded in the collector's office in which the new permanent registry is made, it affords information to any person examining it as to the former home port and collector's office in which the vessel had been previously registered, and where examination can be made for any bill of sale, mortgage, or other incumbrance, upon or against the vessel.

It will be seen, therefore, as the law now stands, there can be very little difficulty on the part of a purchaser or

* 1 Stat. at Large, 294, § 14.

mortgagee in ascertaining the true condition of the title of a vessel, as it respects written evidences of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home ports of the vessel, as the records of the last home port refers to the preceding one, the last bill of sale incorporating into it a copy of the previous certificate of registry. In this respect, the system of recording in the collector's office possesses very great advantages over the filing of these instruments in the clerks' offices where the vendor or mortgagor happened to reside at the time, as no means exist, under this practice, by which the subsequent purchaser or mortgagee, by any diligence, could obtain a knowledge of the actual condition of the title.

We are aware that in the case of *Potter* v. *Irish*,* the court came to the conclusion, upon an examination of the acts on this subject, that bills of sale, mortgages, &c., under the act of 1850, in order to protect the title of the purchaser or mortgagee, should be recorded in the office of the collector of customs at the port of the last registry or enrolment, though not the home port of the vessel. And the court in the case of *Chadwick* v. *Baker*,† followed this decision. Our respect for the courts rendering these decisions has led us to examine the several statutes upon which this question depends with more than usual care, and after the best consideration we have been able to give, we are obliged to differ with them. We think the better construction of these statutes leads to the conclusion that the home port was the one in the contemplation of Congress at which these instruments were to be recorded, and is the more appropriate one in furtherance of the object for which the act was passed.

The temporary registry or enrolment is at a collector's office in a district where the owners do not reside, and is made without any reference to such residence. It is made at any collector's office, and at any port within the limits of the United States where the vessel may happen to be at the time this temporary document is registered.

* 10 Gray, 416.

† 54 Maine, 9.

While the home port may be at the city of New York, the temporary registry or enrolment may be made at New Orleans or San Francisco, or Portland, in Oregon, where it would be as inconvenient for the vendee or mortgagee to make a record of the bill of sale or mortgage as it would be for a person dealing in this species of property to acquire any notice of such record; whereas a record at the home port is within the district where the owners reside, and where negotiations or dealings in respect to this species of property would naturally be conducted.

Some question is made as to the power of Congress over the title and property of vessels of the United States to such an extent as to enable it to pass a recording act.

But, after the regulation of this species of property by the several acts of Congress to which we have referred, and in respect to which there has never been a question, there can be very little hesitation in conceding the power to protect the rights of subsequent *bonâ fide* purchasers and mortgagees therein.

Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1, 1789; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st December, 1792, and must be wholly owned by a citizen, or citizens of the United States, and to be commanded by a citizen of the same.*

And none can be registered or enrolled unless built within the United States before or after the 4th of July, 1776, and belonging wholly to a citizen, or citizens, of the United States, or, not built within said States, but on the 16th of May, 1789, belonging, and thence continuing to belong, to a citizen or citizens thereof; or ships or vessels captured from the enemy, in war, by a citizen, and lawfully condemned as prize, or adjudged to be forfeited for a breach of the laws of

* 1 Stat. at Large, 287.

the United States, and being wholly owned by a citizen or citizens thereof.*

Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction.†

DECREE REVERSED, and a

DECREE ENTERED FOR THE APPELLANT.

THE NICHOLS.

1. Sailing ships are "meeting end on," within the meaning of the eleventh article of the act of Congress of April 29, 1864, fixing "Rules and Regulations for Preventing Collisions on the Water," when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins; a condition which always depends, to a certain extent, upon the state of the navigation, and the circumstances of the occasion.
2. The expression, "meeting *nearly* end on," in the same article, includes cases where two sailing ships are approaching from nearly opposite di-

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* 1 Stat. at Large, § 2, 288.

† The Martha Washington, 25 Law Reporter, 22; Fontaine v. Beers, 19 Alabama, 722; Mitchell v. Steelman, 8 California, 368; Shaw v. McCandless, 36 Mississippi, 296.

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rections, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision; but the application of the rule must be considered as subject to the same limitations and qualifications as is the phrase "meeting end on," in the same article.

3. Accordingly, two sailing vessels pursuing, in the night time, lines which, if followed, it was probable, would bring them into collision, were considered, when but two or three miles apart, as "meeting end on, or nearly end on, so as to involve risk of collision" within the meaning of the eleventh article above referred to, their rate of speed having been, at the time, six miles an hour each, and their rate of approximation, therefore, a mile in each five minutes. *Held*, consequently, that the helms of *both* vessels ought to have been put to port, as provided for in such contingencies by the said article, so that each might have passed on the port side of the other. And a vessel which, in such circumstances, put her helm a starboard, and was run down and sunk by the other vessel, was held to have no claim on her for damages.

4. Mistakes committed in moments of impending peril, by a vessel, in order to avoid a catastrophe made imminent by the mismanagement of those in charge of another vessel, do not give the latter, if sunk and lost, a claim on the former for any damages.

BROWN, owning a schooner of that name, filed a libel in the District Court for Northern New York, against the barque Nichols; the ground of his complaint being, that the two vessels being on Lake Erie, one going in one direction, and the other coming towards it in another nearly opposite, and the two so approaching each other, the barque had, in violation of the "Rules and Regulations for Preventing Collisions on the Water," fixed by the act of Congress of April 29, 1864,* run into his schooner, and sunk her and her cargo. The Phœnix Insurance Company, which had insured the cargo, and paid for the loss, filed a similar libel.

The case was thus:

Congress, by the act above referred to, laid down certain rules or articles, to prevent collisions on the water, and among them these:

"Article 11. If two sailing ships are *meeting* end on, or nearly end on, *so as to involve risk of collision*, the helms of both shall be put to port, so that each may pass on the port side of the other.

* 13 Stat. at Large, 60.

"Article 12. When two sailing ships are *crossing, so as to involve risk of collision*, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, *except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way.* But if they have the wind on the same side, *or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.*

"Article 18. Where, by the above rules, one of two ships is to keep out of the way, *the other shall keep her course.*"

With these articles in force, the schooner was bound up Lake Erie, of a clear, starlight night; her course west by north. The barque was bound down it; her course east by south, half south—the two vessels being nearly dead ahead of each other. The wind was from the northeast, and the speed of each vessel full six miles an hour; the two so approaching one another at the rate of a mile every five minutes. The schooner had the wind free and on her starboard side. The barque was closehauled, with the wind on her port side. Each vessel was seen from the other about the same time, and *when they were some two or three miles apart;* the evidence being conflicting as to the exact distance.

When the two vessels made each other, the mate of the barque ordered her helmsman to "keep her off a little," so as to give the schooner "a good full;" but as the vessels approached closely, he ordered him to "put the helm hard up, and keep her right off;" in other words, to port the helm. The effect of this was, of course, to turn the vessel's head southward. Such were the manœuvres of the barque.

The master of the schooner, on his part, so soon as he saw the barque's lights—judging them to be two or three miles off, "nearly dead ahead, *a very little* on our starboard bow"—ordered his helm put starboard, "to keep her off to the west." The vessels were advancing rapidly, and with the manœuvres ordered, respectively, were fast approaching each other as well. Two or three minutes before the collision—and the vessels being then not more than a quarter of a mile apart—the

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master of the schooner "seeing the barque bearing down on him, and that she was off the wind," ordered the wheel of his schooner put "hard up," and to "let the main sheet run out." The schooner accordingly swung to the south, somewhat of the southwest. But this was too late, or perhaps the very cause of the catastrophe. The barque advancing, went, bow first, and at right angles, into the starboard quarter of the schooner, and the schooner went down at once.

The collision being, of course, the exact result which was liable to follow from the combined manœuvres of the vessels, the question was, which vessel had made the false navigation, under the act of Congress? And this question involved largely a consideration of the element and effects of distance; that is to say, in this particular case, the proximity of the vessels at the time when the master of the schooner gave the first order to starboard.

The District Court, not without hesitation, came to the conclusion that the distance between the vessels at this time —two or three miles—was such that the master was not in fault in making the order; that the case fell within the twelfth rule, and that the barque ought not to have changed her course. Conceding that the vessels were clearly *approaching* each other, "nearly end on," and that if they had both continued their courses, they would soon have been "*meeting* nearly end on, so as to involve risk of collision," within the meaning of the eleventh rule; that court was yet in doubt whether, at the distance at which these vessels were when they first made each other, they were "*meeting* end on, . . . so as to *involve risk of collision*," which the plain import of the eleventh rule required them to be before both were obliged to port their helms. It accordingly dismissed the libels.

On appeal, the Circuit Court was of a different opinion. The vessels being nearly dead ahead, their combined speed being twelve miles an hour, and they being thus within ten to fifteen minutes of meeting, that court considered that they were "dangerously close together," and their proximity such that the execution of the first order to starboard the helm of

the schooner, involved not only the risk of the collision, but was the controlling cause of it; and thinking that the master of the schooner had mistaken the position of the barque, and had supposed that her lights were to the windward, when, in fact, they were to the leeward, reversed the District Court's decrees.

The correctness of this reversal was the question now here, on appeals by the owner of the schooner and by the insurers of her cargo, the Phœnix Company.

Mr. Hibbard, for the appellants:

1. There is no risk of collision when vessels, upon an open lake, and in a clear night, make each other at the distance of two or three miles; nor would there have been the slightest danger of collision, in this case, had not the barque disregarded the eighteenth article, and changed her course.

The act of Congress contemplates such nearness of approach, and imminency of danger, as makes it necessary for both vessels to change; for, beyond question, the act will not be so construed as to require unnecessary manœuvres. Certainly it is not necessary that *both* should so change when they are two miles or anything like that distance apart upon an open lake.* On a narrow river the rule might be different.

If the eleventh article does not apply, it of necessity follows that the twelfth and eighteenth do, and if the barque changed her course (as it is plain that she finally did), she violated absolutely a statutory provision, and must be in fault; for if a vessel bound to keep her course, changes that course, how can a vessel bound to "keep out of her way," know where to turn to avoid her?

2. The case being to be governed by the twelfth and eighteenth articles, it follows that the barque was bound to "keep her course." The schooner was bound simply to "keep out of the way." To do this she could either port or starboard, as she pleased.

* The Ericsson, Swabey, 88; The Monticello, 17 Howard, 152.

3. As the Nichols largely changed her course, and commenced that change when the vessels were yet at a considerable distance apart, that change must make her solely responsible for all the damage done by this collision.

Mr. Ganson, contra, contended that there was not any necessity for any change of course on the part of the schooner; that she was on a course that would have taken her safely to the northward and windward of the barque; that there was nothing to prevent her pursuing that course; and that the change of her course caused the collision. Neither the eleventh nor twelfth articles applied therefore to the case, but the schooner was guilty of bringing about the collision, by attempting to pass across the bows of the barque when there was no occasion for her so doing; and in violation of the rules of navigation.

Mr. Justice CLIFFORD delivered the opinion of the court.

Controversies growing out of collisions between ships on navigable waters are in general of easy solution in cases where the facts are agreed, or where there is no material conflict in the testimony of the witnesses. Few cases, however, find their way into the tribunals of justice where the witnesses examined in the case concur either as to which vessel was in fault, or as to the circumstances attending the collision. On the contrary, such investigations are almost always complicated and embarrassed with conflicting testimony, and sometimes to such an extent that it is exceedingly difficult to form any satisfactory conclusion upon the merits.

Some of the causes which promote such contrariety of recollection are, that the moment when the collision occurs is necessarily one of alarm, and, frequently, of consternation, and also because the disaster is seldom witnessed with much care by any persons other than those on board the respective vessels, and all experience shows that they are quite too apt to see fault in the navigation of the other vessel, more readily than in that of the vessel to which they belong. Where such conflict exists the inquiry is very perplexing,

and the difficulty can only be overcome in a satisfactory manner by a critical analysis of the testimony, and a careful comparison of the respective conflicting statements of the witnesses with the undisputed or well-established facts and circumstances developed in the testimony.

Decrees of an entirely opposite character were rendered in this case in the District and Circuit Courts, obviously on account of differences of opinion produced by the conflicting character of the testimony, and the appellants now set up a theory different from either of those adopted in the courts below, and it must be admitted that it finds some support in the evidence exhibited in the transcript.

In the investigation of such a case the first step is to ascertain the facts material to the issue involved in the pleadings, but in accomplishing that purpose, in this case, it is not deemed necessary to enter much into the details of the testimony, as any such a discussion would not benefit the parties nor any one else not possessed of the entire record. Views of the District Court were that the Nichols was in fault, but the Circuit Court was of a different opinion, and reversed the decree, and dismissed the libel. Appeal was taken by the libellant from that decree of the Circuit Court to this court. Succinctly stated, the material facts of the case, as they appear to the court, are as follows:

Heavily laden with coal and iron, the schooner William O. Brown was bound up Lake Erie, on a voyage from Buffalo to Chicago. Her course was west by north, and when the collision occurred she was about half way between Little's Point and Bar Point, and about one and a half miles from the Canada shore. Statement as to the voyage of the barque A. P. Nichols is, that she came out from Detroit River early in the evening before the collision, and that she was bound down the lake to Buffalo, laden with a full cargo of corn. Undisputed fact is that she was heading east by south, half south, and that she, as well as the schooner, had competent lookouts properly stationed on the vessel. Both vessels also showed good lights, as required by law, and they were well manned and equipped. Prior to their arrival at the place

where the collision occurred they had met with no difficulty, and they had fair weather and a good breeze from the north-east, not exceeding six or seven knots, and the speed of the respective vessels was about six miles an hour. Parties agree that the time and place of the collision is truly alleged in the libel, and there is neither fact nor circumstance in the case to warrant the conclusion that it was the result of any other cause than faulty navigation. Inexcusable as the disaster was, the principal question is, which vessel was in fault? When the vessels came together they had sufficient sea room, and they were both under full sail. The schooner had the wind free, and on her starboard side, but the barque was closehauled, with the wind on her port side. They were on lines which diverged not more than half a point, and which, in any event, if they continued their respective courses, would bring them into collision. Obliged to change their course or collide, the true inquiry is, what should have been done? Clear weight of the evidence is that each vessel was seen from the deck of the other, about the same time, when they were some two or three miles apart, and as they were approaching each other from nearly opposite directions it is quite clear, under the regulations enacted by Congress, that the helms of both should have been put to port, so that each might have passed on the port side of the other, unless the distance between them, at that precise time, was so great as not to involve risk of collision. Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain.*

When the two vessels made each other it was the mate's watch on board the Nichols, and he had command of her deck. His first order to the man at the wheel was to keep her off a little, so as to give the vessel ahead a good full; but as the vessels advanced, seeing that there was danger of collision, he gave the order to put the helm "hard up and keep

* Mail Steamship Company v. Rumball, 21 Howard, 384; The Ericsson, Swabey, 88; Lowndes on Collision, 24.

her right off," which, under the circumstances, was equivalent to the order to port the helm, as the helmsman stands on the weather side of the wheel, and consequently the effect of the order "hard up," when executed, was to bring the helm to port, and turn the prow of the vessel to the leeward.

Before remarking further as to the movements of the barque, it becomes necessary to ascertain what was done on board the schooner, as she was approaching from nearly the opposite direction, at about the same speed. Her master admits that he saw both side lights of the other vessel at the same time, and he testifies that he immediately ordered the helm of his vessel to be put to starboard. Plain effect of that order, when executed, was to turn the prow of the vessel to the leeward, instead of hugging the wind closer, as she should have done, to avoid a collision.

Article eleven of the regulations enacted by Congress provides that if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Sailing ships are meeting end on within the meaning of that provision when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins, which cannot be precisely defined, as it must always depend, to a certain extent, upon the state of the navigation, and the circumstances surrounding the occasion.

Where vessels approaching are yet so distant from each other, or where the lines of approach, though parallel, are so far apart as not to involve risk of collision, that rule of navigation has no application to the case.

Much greater difficulty will arise in any attempt to define, with technical accuracy, the phrase nearly end on, as the language itself is in terms somewhat indefinite. Such attempts have been made in the English Admiralty Court, but without much practical success. Nearly end on, as the

phrase is employed in that article, may doubtless be construed to include cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision; but the application of the rule must also be considered as subject to the same limitations and qualifications as the preceding phrase in the same article. Decided cases may be found in the English admiralty reports where the attempt is made to define, with precision, how great the variation may be from opposite directions, or from parallel lines, and the case still be within the eleventh article; but the present case does not necessarily involve that inquiry, as the variation, in any view of the evidence, did not exceed half a point by the compass, which is clearly insufficient to take the case out of the operation of that article.*

Argument for the appellant is, that the distance between the two vessels was so great when the helm of the schooner was put to starboard that it cannot be considered as a fault, and such, it seems, was the opinion of the district judge; but the proposition, in view of the circumstances, cannot be sustained, as it was in the night time, and the combined speed of the two vessels was at least twelve miles an hour, and none of the witnesses pretend that more than ten or fifteen minutes elapsed after the second order of the master of the schooner was given, to put the helm hard up, before the collision took place.

Strong doubts are entertained whether the effect of the first mistake made by the schooner would have caused a collision if she had then kept her course; but the second order to put the helm hard up, was fatal as the schooner then fell off even faster than the barque, and the collision became inevitable. Particular description of the effect of that movement need not be given, except to say that it brought the schooner directly across the bows of the barque. Confirmation of this view is derived from the conceded fact, that the schooner was struck by the stem of the barque on

* Holt's Rule of the Road, 64, 70, 154.

her starboard quarter. The effect of the blow was that she sunk, and, with her cargo, became a total loss.

Remaining proposition of the appellant is, that the barque is also in fault, because her helm, just before the collision occurred, was put to starboard; but it is clear that the error, if it was one in that emergency, was produced by the impending peril, which is justly chargeable to those having the control and management of the other vessel. Mistakes committed in such moments of peril and excitement, when produced by the mismanagement of those in charge of the other vessel, are not of a character to relieve the vessel causing the collision from the payment of full damages to the injured vessel.

Appeal was taken to this court at the same time from the decree of the court below, in the case of *The Phœnix Insurance Company* v. *James R. Slanson*, claimant, &c., and the two cases were argued here together, as the parties conceded that they depend upon the same facts. All the testimony was taken in the first case, and the stipulation of the parties is, that it should be regarded as also taken in the other, and that both cases should be heard at the same time. Libellants in this case were insurers of the cargo, and having paid the loss to the owner, they claimed that they were subrogated to his rights and interests, and that, by reason thereof, they had a lien upon the barque for the amount which they paid to the owner of the cargo. Evidently the appeal is disposed of by the opinion in the other case.

DECREES AFFIRMED.

THE FLOYD ACCEPTANCES.

1. The government of the United States has a right to use bills of exchange in conducting its fiscal operations, as it has the right to use any other appropriate means of accomplishing its legitimate purposes.
2. When the government becomes a party to such a bill, it is bound by the same rules in determining its rights and its liabilities as individuals are.

Statement of the case.

3. As the United States can only become a party to a bill of exchange by the action of an officer or other authorized agent of the government, the authority of the officer or agent may be inquired into as in the case of the agent of an individual.
4. This authority, in case of bills of exchange, depends upon the same principles that determine such authority in other contracts, and is not aided by the doctrine, that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders.
5. Under our system of government, the powers and duties of all its officers are limited and defined by laws, and generally by acts of Congress.
6. As there is no express authority to be found for any officer to draw or accept bills of exchange, such authority can only exist when these are the appropriate means of carrying into effect some other power belonging to such officer under his prescribed duties.
7. It does not follow that because an officer may lawfully issue bills of exchange for some purposes, he can in that mode bind the government in other cases where he has no such authority.
8. As under existing laws there can be no lawful occasion for an officer to accept drafts on behalf of the government, such acceptances cannot bind it, though there may be occasions for drawing or paying drafts which may bind the government.
9. The acceptances known as the "Floyd acceptances"—(certain acceptances on long time, made by the Hon. J. B. Floyd, Secretary of War, of drafts drawn on him by army contractors, before the services contracted for were received, or the supplies to be furnished were delivered) —were mere accommodation loans of the credit of the United States, without authority, and therefore void.
10. If they had been given and received as payment (which they were not) they were payments in advance of the services rendered and supplies furnished, and were void, because forbidden by the act of January 31st, 1823 (3 Stat. at Large, 723).

APPEALS from the Court of Claims.

The facts, as found by that court, were thus:

Russell, Majors & Waddell had contracts for supplies and transportation, to be furnished to the army in Utah. By these contracts, they were to be paid either by the quartermaster at St. Louis, or by his drafts on the assistant treasurer of the United States in New York. In all the contracts, except one, these payments were to be made on the final delivery of the supplies in Utah; but in one contract there was an agreement that partial payments should be made when the trains were started. In all cases, such pay-

ments were to be made upon certificates of the proper quartermaster.

The performance of these contracts required a very large outlay of money, and Russell & Co. finding it difficult to advance this and wait for its return until they were entitled to receive payment under their contracts, made an arrangement with the Secretary of War, under which they should draw time-drafts on him, payable to their own order, at the Bank of the Republic in New York, which should be accepted by the secretary. On these drafts they were then to raise the money necessary to enable them to perform their contracts, and as the money for the transportation and supplies became due, they were to receive it, and take up the acceptances of the secretary before or at maturity. Under this arrangement the secretary accepted drafts to the amount of $5,000,000, most of which were taken up by Russell, Majors & Waddell, as agreed; but over a million of dollars in amount remain unpaid.

The drafts, with unimportant verbal differences and differences of date, were in this form:

$5000. WASHINGTON, November 28, 1859.

Ten months after date, for value received, pay to our own order, at the Bank of the Republic, New York City, five thousand dollars, and charge to account of our contract for supplies for the army in Utah.

RUSSELL, MAJORS & WADDELL.

Hon. J. B. FLOYD, Secretary of War.

[Indorsement.]

"RUSSELL, MAJORS & WADDELL."

[Acceptance.]

WAR DEPARTMENT, November 28, 1859.

"Accepted: JOHN B. FLOYD,
Secretary of War."

The drafts passed into the hands of different holders; among them T. W. Pierce, the Dover Five Cent Saving Bank, E. D. Morgan, and the Boatmen's Saving Institution; and Mr. Floyd having retired from the War Department,

and the department refusing to pay the acceptances, Pierce, by his separate bill, and the other parties in a proceeding treated by the Court of Claims as one in substance, brought suit in that court. The petition of Pierce averred:

"That the said Floyd, as Secretary of War, and in behalf of the United States, and as the principal officer of an executive department, had authority to accept the drafts, and that, in accepting them, he acted in his official capacity, and in behalf of the United States. And that he, in behalf of the United States, as such Secretary of War, was authorized to accept drafts of such and the like tenor and effect as the drafts aforesaid; and that the said Pierce, relying upon the apparent, as well as upon the actual authority of the said Secretary of War to make such acceptances, and upon the fact of his acceptance of the bills, became the holder and owner of them, in a regular course of business, before they severally matured and for valuable consideration."

Similar averments were made in the petitions of the other three parties. And by an amended petition they set forth the further facts:

That when the bills were accepted, and when they became due, the government owed the contractors a larger sum than the amount of them.

That at that time the army in Utah was in imminent danger from cold and starvation; that it was the duty of Floyd, as Secretary of War, to save it; and that to so save it he authorized the drawing of the bills and accepted them.

That as secretary he had authority by law to make advances to the contractors after their trains were ready to start; and that their trains being ready to start, he did what was done.

That he had authority by law to ascertain and determine the debt of the United States to the contractors, and did so determine; that there was due them the sums specified in the bills; and that the bills so drawn and accepted were conclusive evidence of the debt as against the government.

These same additional matters were considered by the

court below in the case of Pierce. The general issue was pleaded in all the suits.

To present the case more completely, it must be stated that by statute of 31st January, 1823,* it is enacted:

"That from and after the passage of this act *no advance of public money shall be made in any case whatever;* but in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment."

The Court of Claims—upon a full history of the facts, as presented by evidence introduced by the government, and whose introduction was opposed by the petitioner, Pierce, —the admission being one of the errors alleged by Pierce himself—dismissed all the cases, holding, in the case of Pierce, that the secretary had no power to bind the United States by the acceptances; that the acceptances were to be regarded as within the act of 31st January, 1823, and as an attempt to avoid it, and were, therefore, void; that no decision of the Supreme Court authorized such acceptances; that the evidence failed to establish any usage, in the different departments, by which the Secretary of War was authorized to accept, in behalf of the United States, the bills in suit, and that if such usage or practice were established, it could not avail the claimant, because forbidden by law.

And finding, in the other three cases, that though it is and has been the practice of heads of departments to accept drafts or bills of exchange *for the transmission of funds to disbursing officers*, or the payment of *those serving in distant stations, or for services rendered*, the cases were still substantially the same as the case of Pierce, and, like it, to be dismissed.

The record did not show that anything remained due to the contractors, or was due when the bills matured; no evidence on the state of the accounts being given on either side.

* 3 Stat. at Large, 723.

Argument for the appellants.

Messrs. Black, Curtis, and Gooderich, for the appellants:

The Court of Claims declared the acceptances to be null and void, for the reasons, in substance, that—

1. To accept these particular bills was a violation or evasion of the act of 1823.

2. No usage to accept bills like these existed in the department, and that such usage would be unlawful if it did exist.

3. No decision of the Supreme Court authorized these acceptances, or made them binding.

Now was this an advance of public money? Take it to be true that the acceptance was given for money yet to be earned. Then the case is this: The contractor comes to the secretary and tells him that the army in a distant and hostile territory is in danger of suffering for lack of supplies, and he (the contractor) cannot furnish them without more capital than his present means will command. The secretary says, "I can pay you no money out of the public treasury until it is due, according to the very terms of your contract; but your credits are daily accumulating, and in a few months the sum you want will be legally payable. I have no objection to put the future obligation of the United States into a negotiable form, so that if you are willing to pay the discount, you can get somebody else to make the advance, which I cannot make. But I must do this cautiously. I will subject the government to no risk. I will accept your bills only for fifty per cent. of the amount which will be due upon the delivery of the goods which are now actually *in transitu*." This was the reverse of an advance of the public money.

The court assert that the acceptances were not authorized by the decisions of the Supreme Court. Yet the power is recognized in many decisions, and in *The United States* v. *Bank of the Metropolis*,* at least, it is directly and positively affirmed.

The authority of the secretary to give these acceptances,

* 15 Peters, 377.

is proved beyond a doubt, unless the practice of eighty years, with the sanction of Congress and the express adjudication of this court, is to be disregarded. It is a curious fact, that the Court of Claims in the case of Pierce, deny the authority of a secretary to accept bills of exchange, and accompany that denial with an assertion that the practice does not exist; while in the other case they admit that "*it is and has been the practice* of heads of departments to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or for the payment of those serving at distant stations, or for services rendered." This last statement is true. Being true, it shows the existence of the power in a secretary to bind the United States in that way.

The Equities.—So far as regards these, the defence is utterly naked. All the facts found by the court show that there was no fraud or collusion between the drawers and Floyd, nothing done and nothing intended except what was right and proper.

In *United States* v. *Reeside*, tried before the late Mr. Justice Baldwin,* a case very similar to this, though the acceptance there was by the Postmaster-General, he charged the jury thus:

"This is the broad rule by which to measure the official acts of the Postmaster-General, done within his granted powers: The agency of the Postmaster-General is not confined to the letter of the law. The known usage of this department, not corrected or repudiated by any law, may be equivalent to a new grant of power by Congress, especially in matters officially communicated to either House, and not *disposed of by resolution or forbidden by law; the acquiescence of the legislature in a notorious usage having the same effect of a law where former laws are silent on the subject.* This is a rule in relation to all the departments of the government. The operations of the Post-office Department cannot be suspended for an hour without public complaint and inconvenience. Yet contingencies constantly arise, which require the most prompt and efficient action, without regard to

* MS.

expense in any case, and often without inquiring into his powers, which the *public take for granted are adequate to any emergency, and hold him responsible for their plenary exercise.* We cannot sanction the doctrine contended for, that we must settle controverted accounts with a view to the public interests. If injustice has been done to the United States by their authorized agent, which can only be repaired by the invasion of a private right, they must seek their remedy against their officer. If he accept the draft of a contractor, *absolutely, the United States is bound to pay it to the holder to the same extent and on the same principle which apply to a bill of exchange drawn on, and accepted by, a private person.* So the Supreme Court have settled the law, in *United States* v. *Bank of the Metropolis.*"

Mr. Evarts, Attorney-General, and Mr. Dickey, Assistant Attorney-General, contra, contended:

That the Secretary of War is in no sense a principal; he is only one of the agents of the executive departments of the government, with powers defined and duties indicated by law.

That the powers of a public agent are to be determined by law, and those powers are limited by the law to the performance of specific duties imposed upon such agents; and his powers are to be construed with reference to the design and object of them.

That the powers of such an agent being conferred and limited by law, all persons dealing upon his authority, are chargeable with notice of the extent of his powers.

That all the fiscal operations of the United States, all the bonds, bills, and notes issued by the government, are required, by law, to be done by the Treasury Department, the sole agency, under the law, authorized to perform those functions.

That no bond, bill, treasury note, or other evidence of debt, can be issued, nor can any debt against the United States be created, except in virtue of a law of Congress.

That, therefore, the Secretary of War had no authority, in virtue of his official character, to accept bills of exchange and bind the United States for their payment.

That the issuing and use of the bills of exchange, in this case, for the purposes disclosed in this investigation, was without authority of law.

Mr. Justice MILLER delivered the opinion of the court.

The cases before us are demands against the United States, founded upon instruments claimed to be bills of exchange, drawn by Russell, Majors & Waddell, on John B. Floyd, Secretary of War, and accepted by him in that capacity; purchased by plaintiffs before maturity, for a valuable consideration, and, as they allege, without notice of any defence to them.

Mr. Pierce, in his petition, relies on the facts that the signature of John B. Floyd, to these acceptances, is genuine, and that he was at the time of the acceptance Secretary of War, as sufficient to establish his claim. He avers that Floyd, as Secretary of War, had authority to accept the drafts, and that by his acceptance the United States became bound. It is evident that he means by this merely to assert, as a principle of law, that, by virtue of his office, the secretary had such authority, and not that there existed, in this case, special facts which gave such authority; for he mentions no such facts in his petition, and when the solicitors for the defendant undertook to show under what circumstances the bills were issued and accepted, he objected to the evidence. Its admission is one of the alleged errors on which he brings the case to this court.

Both Mr. Pierce and his counsel, therefore, claim to recover on the doctrine that when a party produces an instrument in the form of a bill of exchange, which he has purchased before its maturity, drawn on the Secretary of War, and accepted by him, he has established a claim against the government which admits of no inquiry into the circumstances under which the acceptance was made.

The other defendants, also, in their original petitions, assert and rely upon the same principle; but they have also filed amended petitions, in which they set forth facts connected with the acceptance of the secretary, which they

deem sufficient to establish his right or authority to do so. Most of the facts, found under the issues made by these amended petitions, were also found under the general issue in Pierce's case, notwithstanding his objection; so that, if they avail the other plaintiffs, they will also support his claim.

It will be convenient, therefore, to consider, first, the proposition on which he rests his case, which, if found to be sound, disposes of all the cases in favor of plaintiffs.

One of the main elements of that proposition, much and eloquently urged upon our attention, seems to be too well established by the decisions of this court, to admit now of serious controversy. It must be taken as settled, that when the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper.

Conceding, then, for the sake of argument, that the instruments under consideration are, in form, bills of that character, and that the signature of Floyd is genuine, and that he was at the time Secretary of War, there remains but one question to be considered essential to plaintiffs' right to recover, and that concerns the authority of the secretary to accept the bills on behalf of the government.

It is not to be denied, that in the extensive and varied fiscal operations of the government, bills of exchange are found to be valuable instruments, of which it has the right to avail itself whenever they may be necessary. In the transfer of immense sums of money from one part of the country to another, and in the payment of dues at distant points, where they should properly be paid, it uses, as it ought to use, this time-honored mode of effecting these purposes.

In the case of such paper, issued by an individual, when

we make ourselves sure of his signature, we are sure that he is bound, because the right to make such paper belongs to all men. But the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers confided to them.

An individual may, instead of signing, with his own hand, the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

When this inquiry arises, where are we to look for the authority of the officer?

The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government,

from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress.

The counsel for claimants, not altogether rejecting this view of the matter, maintain that the power is derived—

1st. From the true construction of the Constitution and acts of Congress.

2d. From the decisions of the Supreme Court of the United States; by which is probably meant only the authoritative construction of the Constitution and laws.

3d. From the usage of the government in similar cases.

We will examine these several alleged sources of the power in the reverse order to that here stated.

1. As regards usage, it must occur at once that if there are instances in which the use of bills of exchange by the officers of government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, cannot establish a usage in cases not so authorized. It may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever by its frequency be made to stand as a just foundation for the very authority which is thus assumed.

It is to be observed in this connection, that the Court of Claims finds as a fact, in Pierce's case, that "the evidence fails to establish any usage or practice in the different departments of the government, by virtue of which the Secretary of War was authorized to accept, in behalf of the United States, the bills in suit;" and so far as that case is concerned this inquiry might close there.

But in the finding of facts which the same court makes in the other three cases, it is said, "That it is, and has been the practice of the heads of departments, to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered." The usage here found is limited to specified classes of cases, and if authorized by law, can be no evidence of a usage in cases not so authorized. It cannot be held to support the allegation of a usage so general as to apply to any case in which the head of the department may see proper to use it.

We make the further observation in this connection, that while it is readily to be seen that the exigencies of the business of the departments may require drafts to be drawn by them, and may justify drafts being drawn on them, which they ought to and do pay when presented, there can be no occasion for an acceptance by any department or officer of a draft drawn on either of them.

We do not think, therefore, that usage is a sufficient reliance as an authority for the acceptance of these drafts.

2. The *United States* v. *Bank of the Metropolis*,* is the case mainly relied on as establishing the doctrine contended for by plaintiffs, and is confidently asserted to be conclusive of the cases under consideration, unless overruled.

That case undoubtedly did decide, that when an officer of the government, *authorized to do so*, accepted a draft in behalf of the United States or one of the departments, the validity of the instrument could not be disputed in the hands of an innocent holder. We have already stated this as the established doctrine of this court. And that proposition was the principal, if not the only one, controverted in that case. An attentive examination of it will show that the authority of the officers to accept was not raised by counsel or considered by the court.

The Bank of the Metropolis being sued for certain balances in favor of the United States, pleaded as a set-off a

* 15 Peters, 377.

draft drawn by Edwin Porter on Richard C. Mason, Treasurer of the Post Office Department, at ninety days, and accepted by him as Treasurer; and also four drafts at ninety days, drawn by James Reeside on Amos Kendall, Postmaster-General, and "accepted on condition that his contracts be complied with."

It does not appear to have been controverted that Mason had authority to accept the draft of Porter, by either the counsel for the government or the bank; and the court seem to have treated it as conceded.

The opinion of the court, after stating the facts, opens with the declaration that, "when the United States, *by its authorized officer*, becomes a party to negotiable paper, they have all the rights, and incur all the responsibilities of individuals who are parties to such instruments." And further on it is said, that "an unconditional acceptance was tendered to it (the bank) for discount; .... all it had to look to was the genuineness of the acceptance, and the *authority of the officer* to give it." If this language has any significance, it is that the authority of the officer, like the genuineness of the signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government.

Only a small part of that elaborate opinion is devoted to Porter's draft, and to the questions involved in it, and the remainder of it is occupied in discussing the effect of the condition annexed to the acceptance of Reeside's draft on its commercial character, and to determining what is implied in that condition.

It seems, therefore, quite clear that no consideration whatever was given by the court to what constituted an authority to draw or accept bills of exchange; but that it was impliedly held to be a matter always open to inquiry when the draft was attempted to be enforced against the government. Nor are we aware of any case in this court in which the rule for determining that authority has been laid down.

Recurring, then, to the written law as the exclusive source of such authority, we may confidently assert that there is no

express authority to any officer of the government to draw or accept bills of exchange.

Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law.

Does the contract, called a bill of exchange, stand on any different footing? It is true, that when once made, by a person having authority to make it, in any given case, it is not open to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness, and good faith which attended its origin, or any of its subsequent transfers; but, in reference to the authority of the officer who makes it, to bind the government, it is to be judged by the same rule as other contracts.

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance, is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government.

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a

bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual.

If A. authorizes B. to buy horses for him, and to draw on him for the purchase-money, B. cannot buy land and bind A., by drawing on him for the price. Such a doctrine would enable a man, in private life, to whom a well-defined and limited authority was given, to ruin the principal who had conferred it. So it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit. No government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper.

In accordance with these views, we are of opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government.

An examination of the facts found by the Court of Claims, confirms the views already stated.

Counsel for the plaintiffs seem to have been of the opinion, from the start, that there was nothing in the nature of the transaction which would support the paper on which they sued, for they steadily resisted all efforts on the part of government to give the facts in evidence; and in the arguments made in this court, the right to recover is rested almost exclusively on the proposition that, because in some cases the secretary might lawfully accept, it must be presumed in their favor that these drafts were lawfully accepted.

It seems to us that such a transaction can be defended on no principle of law, and that, in thus lending to Russell & Co. the name and credit of the United States, the secretary was acting wholly beyond the scope of his authority. The paper was, in fact, accommodation paper, as it was found to

be by the Court of Claims, by which the secretary undertook to make the United States acceptor for the sole benefit of the drawers. It was a loan of the credit of the government volunteered by him, without consideration and without authority. That the transaction was not payment, nor intended to be payment, for the supplies furnished, is clear, because the acceptances were not expected to be paid by the government, nor payable at the treasury, but were to be met by the drawers at the bank with which they dealt. These drafts did not interrupt in the least the regular payments made to Russell & Co. by the Quartermaster's Department, according to their contracts. Nor do the drafts seem to have had any relation to anything due on these contracts, or to what might become due before their maturity. It was, therefore, not payment, nor so considered by either party.

But if these acceptances can be considered as payments, they were payments in advance of the service rendered and supplies furnished—payments made before anything was due. They are in that view not only without authority of law, but are expressly forbidden by the act of January 31, 1823.* The first section of that statute, which has never been repealed, enacts "that, from and after the passing of this act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the services rendered, or the articles delivered previous to such payment."

The transaction by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the government. Every citizen of the United States is supposed to know the law, and when a purchaser of one of these drafts began to make the inquiries necessary to ascertain the authority for their acceptance, he must have learned at once that, if received by Rus-

* 3 Stat. at Large, 723.

sell, Majors & Waddell, as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority.

It is proper to observe, that it does not appear from this record, that anything remains due to Russell & Co., under their contract with the government, or that anything was due them at the maturity of any of these drafts, nor is there any attempt on the part of plaintiffs to show either of these things, or the state of the accounts between those contractors and the government at the time the drafts matured.

These cases have long been before the departments, before Congress, and the Court of Claims, and have been the subject of much laborious consideration everywhere. The amount involved is large, the principles on which the claims are asserted, are, to some extent, new, and we have given them a careful and earnest investigation. We are of opinion that the judgments rendered by the Court of Claims against the plaintiffs, must be

AFFIRMED.

Mr. Justice NELSON (with whom concurred GRIER and CLIFFORD, JJ.) dissenting:

I am unable to concur in the opinion just delivered.

The instruments, in the form of bills of exchange, drawn by Russell, Majors & Waddell, upon, and accepted by Floyd, Secretary of War, were drawn on "account of our contract for supplies for the army in Utah," or "on account of our transportation contract of the 12th April, 1860."

These are not bills of exchange, in the sense of the law merchant, or possessing the properties of negotiable paper. They are drawn upon a particular fund, in terms which may or may not be sufficient to pay the bills, and hence a contingency exists whether or not they will be paid at maturity. All the cases agree that the money mentioned in the instrument must be payable absolutely and at all events, and not made to depend on any uncertainty or contingency.*

* 3 Kent's Com. 76-7, and notes; Story on Bills of Exchange, § 46.

The instruments not being negotiable, the assignees or holders taking them, are subject to all the equities that may exist between the acceptor and the drawer, and stand in no better position, in the present case, than Russell, Majors & Waddell. As between these parties and the government, the obligation assumed by Floyd, as representing it by his acceptance, was to account and to apply all the moneys due, or that might become due on the contracts for transportation or supplies, specified in the bills or drafts, at their maturity. To this extent the government became bound to the contractors, or to the assignees or holders of the same; and as the acceptance by the secretary assumes or implies that there were some funds due, or might become due on the contracts in his hands, subject to these drafts, the onus was on the government to give evidence of the amount, or to state the account with the drawer, so as to ascertain the amount due, if any. This evidence was peculiarly in the power of the government. As no such adjustment has been made, for aught that appears, the government may now have in its hands moneys belonging to these contractors, to pay the drafts.

I am of opinion, also, that under the sixth section of the act of May 1, 1820, it was competent for the Secretary of War to accept bills of exchange in behalf of these contractors, and that if the bills in question had possessed negotiable properties, the government would have been bound to a *bonâ fide* holder for value.

That section provides, "that no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment; and excepting, also, contracts for the subsistence and clothing of the army or navy, and contracts by the Quartermaster's Department, which may be made by the secretaries of those departments."

It will thus be seen that contracts for the subsistence and clothing of the army and navy, by the secretaries, are not tied up by any necessity of an appropriation or law author-

izing it. The reason of this is obvious. The army and navy must be fed, and clothed, and cared for at all times and places, and especially when in distant service. The army in Mexico or Utah are not to be disbanded and left to take care of themselves, because the appropriation by Congress, for the service, has been exhausted, or no law can be found on the statute book authorizing a contract for supplies. The above act confers upon the secretaries full authority to contract for these supplies, and which bind the government; and the most ready and convenient mode of accomplishing this, would be by accepting bills of exchange drawn by the contractors of the distant army or navy, upon the secretaries at home.

The credit of the government, thus pledged, would at once furnish the necessary subsistence, clothing, and shelter.

Our conclusion is, that the judgment below should be reversed, and the cause remitted, with directions to grant a new trial, and further proofs taken, that complete justice may be done between the parties.

WHITELY v. SWAYNE.

1. Where a patent has been granted for improvements, which, after a full and fair trial, resulted in unsuccessful experiments, and have been finally abandoned, if any other person takes up the subject of the improvements, and is successful, he is entitled to the merit of them as an original inventor.
2. He is the first inventor, and entitled to the patent, who, being an original discoverer, has first *perfected and adapted* the invention to actual use.

WHITELY filed a bill against Swayne, in the Circuit Court for Southern Ohio, to enjoin the use of a certain machine known as the Kirbey Harvester.

As the case was presented in the argument, he relied upon a patent granted to one Steadman, May 23, 1854, for an improvement in clover and grass-seed harvesters, which had

been assigned to him (Whitely), and surrendered, and three reissues granted to him on the 19th June, 1860.

The machine complained of, and sought to be enjoined, had been originally patented to one Byron Dinsmore. Dinsmore's specification was sworn to, December 31st, 1850, and was received at the Patent Office, January 10th, 1851. His patent was issued February 10th, 1852. He made and tried one of his machines in 1850, and cut some ten or twenty acres with it. In 1851 he made twenty-one of them, and between fifty and sixty of them in the following year. On the 18th of April, 1852, three months after the date of Dinsmore's patent, Steadman filed a caveat in the Patent Office, in which he stated that he was engaged in making experiments for perfecting certain improvements in a machine for harvesting clover and grass-seed, preparatory to letters patent therefor. As already stated, this patent was granted May 23, 1854. Besides the caveat and the patent, there was an account, given in the testimony, of the working of the machine, by Mr. Hatch, a neighbor of Steadman's, who resided in Holley, Orleans County, New York, in 1854. The machine was tried in the neighborhood on several occasions in clover fields, but never went into successful practical operation. No machines were ever made under the patent after the first, which was about the time the patent was granted. The experiment appeared to have been wholly given up and abandoned by Steadman as a failure; and it thus remained for some six years, when the complainant (Whitely), took from him an assignment of the patent, and procured the three reissues already referred to.

The bill was dismissed by the court below, and the complainant brought the case here.

Mr. Fisher, for the appellant.

Mr. Wright, contra.

Mr. Justice NELSON delivered the opinion of the court.

The plaintiff's title, and the one upon which he must succeed against the defendant, if he succeeds at all, rests upon

a patent for improvements in a machine for harvesting clover and grass-seed; which improvements, after a full and fair trial, resulted in unsuccessful experiments, and which were finally abandoned. They never went into any useful or practical operation, and nothing more was heard of them from Steadman or any other person, for a period of six years. At the end of this period the plaintiff takes an assignment of the patentee, and is, doubtless, vested with all his rights. But what were those rights? Clearly, if any other person had chosen to take up the subject of the improvements, where it was left off by Steadman, he had a right thus to enter upon it, and if successful, would be entitled to the merit of them as an original inventor, for he is the first inventor, and entitled to the patent, who, being an original discoverer, has first perfected and adapted the invention to actual use.*

Hence, if Dinsmore's patent was later than that of Steadman, and was for similar improvements, it would constitute a perfect defence against the suit in the present case, as the plaintiff is obliged to rely wholly on this assignment of Steadman, and stands in his footsteps, and has no better title. But the fact is otherwise. Dinsmore's invention goes back to the year 1850. His first machine was successfully tried in the harvest of that year. Some twenty-one were made in the year 1851, and from fifty to sixty in 1852. Steadman's caveat was even not filed in the Patent Office till after Dinsmore's patent was issued. The present defendant derives his title from Dinsmore. The case is too plain to require any extended examination.

DECREE AFFIRMED.

* Curtis on Patents, § 48, p. 87, and notes.

GARRISON v. UNITED STATES.

An amendment, not very clear in its terms, to an original government contract, was in this case interpreted against the interests of the government, the amendment having been suggested by one officer of the government, signed by another officer in behalf of the government, without its being signed by the contractor on the other side, and the interpretation which this court thus, and upon what it deemed a reasonable construction of the language of the amendment, gave to the amendment, having been that which the officer who suggested it had acted upon as the right one.

APPEAL from the Court of Claims; the facts as found by that court being thus:

The Secretary of War, by an order, approved by the President, of the date of September 1st, 1861, authorized General Butler to "raise, organize, *arm, uniform, and equip,*" in the New England States, a force not exceeding six regiments, and his requisitions on the quartermaster's, ordnance, and other staff departments of the army, were to be obeyed, provided "the cost of such recruitment, armament, and equipment, did not exceed, *in the aggregate,* that of like troops now or *hereafter* raised for the service of the United States." Under this order, one C. K. Garrison entered, October 7th, 1861, into a written contract with General Butler, by which he, Garrison, agreed to deliver to the United States six thousand "Minie rifles of the *Liege* pattern, with sabre bayonets, and all appendages complete;" and the United States contracted and agreed "to pay for each of said rifles, as shall pass inspection, the sum of *twenty-seven dollars,* or *such less sum* as the Ordnance Department may have paid for guns like in quality or description, or contracted to pay for *to said Garrison.*"

At the date of this agreement, Garrison had a contract then existing with the Ordnance Department, dated July 1st, 1861, for ten thousand Liege guns, at $27 per gun, which had not then been performed. But he had not made any contract as yet for any other kind of gun.

Statement of the case.

Before the time had elapsed for the delivery of the guns, to be delivered under his contract with General Butler, *Major Strong, chief of ordnance of the New England Department*, suggested that the *Enfield* rifle should be substituted for the *Liege* pattern; and this being agreed to, a memorandum, as follows, was indorsed on the original contract:

"It is agreed by the United States to accept from C. K. Garrison, the contractor, *the long Enfield rifles, with bayonets of the triangular pattern*, in place of the *sabre bayonets*, upon the value conditions *as are herein specified*.

"B. F. BUTLER,
"Maj. Gen'l Comd'g."

Under the contract as thus altered, six thousand muskets, which it was admitted conformed with the requirements of the engagement, were seasonably delivered, and two vouchers were given, with the approval of General Butler, to Garrison, by Major Strong, at $27 per gun, the first dated November 20th, 1861, for 2800 guns, and the second the 11th of December following. The first one was paid in full. But on the voucher for the remaining 3200 guns, in consequence of orders received from the Secretary of War, no more than $20 a gun was paid; Major Strong, however, certifying upon it, that the voucher, as made out (that is to say, with the sum of $27 a gun charged), was "correct and just," "*the contract price being $27 each gun.*"

At the date of the contract, the price of the sort of guns specified in the memorandum made by General Butler, and which Garrison furnished, was from $20 to $23 a gun. It did not appear, however, that the *Liege* gun had been purchased for less than $27.

Upon the foregoing case the Court of Claims held:

First. That by the true construction of the contract and supplement, the United States were to pay to Garrison the same price the Ordnance Department had previously agreed to pay him for guns of like quality and description.

Second. That not having any such agreement with the Ordnance Department for guns of the quality or kind de-

livered, he was entitled to such price for them as the Ordnance Department were paying for *similar* guns at or about the date of the contract or delivery of the guns.

From this decree Garrison appealed to this court. The case was submitted on briefs. *Mr. T. J. D. Fuller, for the appellant*, insisting that the only effect of this supplementary indorsement of General Butler was to substitute the Enfield for the Liege gun, at *the same price that was agreed to be paid for the latter; Mr. Hoar, Attorney-General*, for the government, maintaining, *contra*, that its effect was to accept the Enfield rifle at any sum less than $27, for which the United States had purchased Enfield rifles, prior to the date of the contract, from any other person; General Butler's authority from the Secretary of War to contract having been limited to the prices which the government had paid for arms similar to those which he bought.

Mr. Justice MILLER delivered the opinion of the court.

The matter in issue is to be determined by a sound construction of the written contract.

It must be confessed that the language of the memorandum is not happy. To accept the Enfield rifle, in place of the sabre bayonet, "upon the value conditions as are herein specified," is not very clear, and at best but amounts to a reference to the original agreement for the price of the substituted gun.

We are inclined to the view of the contract claimed by plaintiff, for the following reasons:

1. The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expressions should, therefore, according to a well-known rule, be construed most strongly against the party who uses the language.

2. The change in the contract was made at the request of the ordnance officer of the government. It was, therefore, for the accommodation of defendant.

3. This construction was acted upon at the time by Major Strong, the officer at whose suggestion it was made, and who certified the account, and paid at that price for the first 2800

guns, and would have paid the same price for the others, but was forbidden by the Secretary of War.

4. According to our construction of the original agreement, the alternative price, less than $27, was the price of Liege guns, for which the government might have paid, or contracted to pay, *Garrison*, before the present contract. This view is confirmed by the fact, found by the court, that Garrison had a contract with the Ordnance Department, of July 1, 1861, for ten thousand Liege guns, at $27 per gun, which had not then been performed. It seems reasonable that it was in reference to this contract with Garrison, already made by the department, the price of which was probably unknown to General Butler, that the provision was inserted by which he secured himself against paying more than the government had already paid for similar guns to the same party, and as Garrison knew what the price in that contract was, he had no objection to the provision.

If this view of the alternative clause of the original agreement be correct, then it could have no application to the substituted Enfield rifle, because Garrison had never received any pay, or contracted to receive pay, for such guns, with the Ordnance Department. The effect of this was to leave the reference of the subsequent indorsement to the original contract for the price, as limited to the $27.

As we have already said that we believe this to have been the real intention of the parties, it should be carried into effect by the Court of Claims.

It is objected to this view that General Butler's authority, from the Secretary of War, to contract, was limited to the prices paid by the government for arms similar to those purchased by him, and that this court finds that Enfield rifles were then being purchased at from $20 to $23 per gun.

We do not so understand the order to General Butler. His order was to raise, arm, and equip, six thousand men, "provided the cost of such recruitment, armament, and equipment, does not exceed *in the aggregate* that of like troops now or *hereafter* raised for the service of the United States."

Our first observation is, that this must evidently have been

merely directory to General Butler; for it could not have been supposed that he could contract with any person for arms, clothing, &c., at prices to be determined by what the government could buy them for afterwards.

2. General Butler was only required to bring the costs of recruiting, arming, and equipment, in the aggregate, within that of like troops raised for the service. This, of course, left him a discretion in contracting for each article he needed, provided the amount of all his contracts did not exceed the expense laid down by the rule.

The judgment of the Court of Claims is REVERSED, with instructions to the court below to enter a judgment for the plaintiff for the difference between $20 and $27 each for the 3200 guns described in the second voucher.

JAMES v. BANK.

Where there is no bill of exceptions, and nothing upon which error can be assigned, the regular practice is to affirm the judgments, not to dismiss.

IN error to the Circuit Court for Louisiana.

The Bank of Mobile brought suit in the court below against one James, on bill of exchange. The record of the case, as sent here, contained nothing but the declaration; the plea of the general issue; the proof of protest of the bill of exchange, indorsed by the defendant, and notice to him of non-payment, and judgment of the court in favor of the plaintiff. There was no bill of exceptions, and nothing upon which error could be assigned.

A motion was now made *by Mr. P. Phillips, in behalf of the defendant in error*, to *dismiss the case;* an unreported order of dismissal, which was said to have been made at the last term on a similar case, being referred to.

Mr. Carlisle, contra.

Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

The regular course, in cases of this description, is to affirm the judgments. The appeal is regularly here, and cannot be dismissed for want of jurisdiction. The motion, therefore, must be DENIED.

Counsel for the appellee has referred us to an order dismissing a writ of error at the last term, under circumstances like those of the case before us. This order must have been entered through inadvertence, and cannot be drawn into a precedent.

BLITZ v. BROWN.

A writ of error dismissed where the transcript contained only a blank form of a certificate of authentication, without the seal of the court below or the signature of its clerk. Leave was, however, granted to the plaintiff in error to withdraw the record, but not for the purpose of having it perfected and returned here and placed on the docket, as if it had been regularly filed.

IN this case—a writ of error to the Supreme Court of the District of Columbia—no authenticated transcript of the record had been filed. That which purported to be a transcript contained only a blank form of a certificate of authentication, without the seal of the court below or the signature of its clerk.

Two motions were now accordingly made; the first by *Mr. Carlisle, for the defendant in error*, to dismiss, the second by *Mr. Bradley, in behalf of the plaintiff in error*, for leave to withdraw the paper from the files, in order that the blank certificate might be duly signed and sealed, and that when thus perfected, the record might be returned and have its place on the docket, as if regularly filed, according to law and the practice of the court.

The CHIEF JUSTICE delivered the opinion of the court.

The filing of such a paper, as has been filed in this case, is not the filing of the transcript at the next term after the

issuing of the writ of error, without which we can have no jurisdiction of the case. The motion to dismiss must be allowed.

So much of the motion made in behalf of the plaintiff in error as asks leave to withdraw the record is granted; but the residue of the motion must be denied. The case can be brought here only by a new writ of error.

WASHINGTON COUNTY v. DURANT.*

Cases cannot be brought within the appellate jurisdiction of this court by agreement of parties, and without an appeal allowed or writ of error served.

THE record showed that this cause had been brought here from the Circuit Court for Iowa, as on a writ of error, *by agreement of parties, and without the issuing or service of such a writ.* Coming before this court on a printed argument for the defendant in error, and the fact above-mentioned being observed by the court, the appeal was DISMISSED; the CHIEF JUSTICE stating it to be the opinion of the court, that an appeal allowed or a writ of error served, was essential to the exercise of its appellate jurisdiction.

AUSTIN v. THE ALDERMEN.

If a State statute, passed in professed exercise of an authority given by Congress to the States to pass such a statute, does not deprive, contrary to the act of Congress, *the party to the suit*, of any right, nor work, as to him, any effect which the act of Congress forbids, this court cannot, on the case being brought here by such party, on the ground that the State statute violated the act of Congress, declare the State statute void.

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* Decided at December Term, 1865.

Statement of the case.

Nor, in considering whether the act does or does not do this, will this court enter upon the question, whether, in another case arising upon a different state of facts from that of the case before it, the statute might not produce results in conflict with the act of Congress, and which this court would therefore be bound to revise and correct.

ERROR to the Supreme Judicial Court of Massachsetts.

The case was this: By a true interpretation of the rights of the Federal government, as settled by this court, the States have no right to tax its means and instruments of government. However, Congress, in creating the associations known as National banks—and by a statute which obliges the parties applying for banking privileges to designate the "particular county and city, town or village," where the business of the association is to be carried on—made a proviso, in these words, as to the right of the States to tax them:*

"*Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person, from being included in the valuation of the personal property of such person, in the assessment of taxes imposed, by or under State authority, at the *place where such bank is located, and not elsewhere*," &c.

In exercising or attempting to exercise the authority thus conferred, Massachusetts—in which State many of these associations were, and under whose system of taxation it is the practice to include in the valuation of the personal property belonging to its taxable citizens, everything of that nature, which they own in any place whatever—enacted a statute thus (act of May 15, 1865, ch. 242):

"The assessors of each city and town, *in which any shareholder in such association resides*, shall include all shares in such associations held by persons resident and liable to taxation in said city or town, in the valuation of the personal property of such person, for the assessment of all taxes imposed and levied in said town by authority of law, to be assessed," &c.

* 13 Stat. at Large, 112.

Statement of the case.

In this condition of the statutes, Federal and State, the assessors of Boston valued and assessed the bank shares of Austin, *living in Boston*, and being the owner of stock in six banks situated *there*. He objected to this, because, as he maintained, the Massachusetts act, under which it purported to be done, did not conform to the limitation of the act of Congress, as to the *place* of taxation; that is to say, he maintained that the State law, in order to conform to this limitation, should have authorized the assessors to include the shares of the National banks in the valuation of the personal property of the holders *only in the place*, i. e., *in the city, county or village* where the banks were located; whereas the State law had disregarded the limitation as to place, by requiring the assessors to include these shares in the valuation, not in the city, town or village only where the bank is located, but *elsewhere*, to wit, in the town *where the shareholders reside;* and so that, under the State act, shareholders in the National banks, residing in cities, towns, or villages where no banks were located, might be assessed there for shares which they owned in banks located in cities, towns, or villages where they do not and never did reside.

On suit brought against him by the Aldermen of Boston, for the tax which the city assessors had assessed on his bank stock in Boston, the Supreme Court of the State decided, that the true construction of the proviso did not confine the assessment of the tax to the place where the bank was located, and that it merely required that the tax, to be valid, should be imposed under the State authority existing at the place where it was thus located;* in other words, "that the reference in the proviso to the place where the bank is located, was designed to define the State authority which was to be allowed to impose a tax, and not to limit the place of assessment."

It will, of course, be observed by the reader—whether this interpretation of the act was well founded, or whether the one of Austin was right—that—assuming the State act to

* Austin v. The Aldermen, &c., 14 Allen, 359–365.

be valid at all—so far as Austin was concerned, no practical injury was done *him*, he residing in Boston, and *all* the banks in which he had stock being situated *there;* or in other words, that had the State act conformed to the proviso of the act of Congress, as interpreted by him, the result, to *him*, would have been the same, though it might not have been to persons living out of Boston, and having stock in banks in that city.

The case was now here under the twenty-fifth section of the Judiciary Act, which gives a right of review here to a party where there has been drawn in question in the highest court, the validity of a statute of a State as being repugnant to a law of the United States, and the decision has been in favor of such validity.

Mr. I. J. Austin, for the plaintiff in error, argued that the only question before this court, was this precise one, viz., whether the construction put, by the Supreme Court of the State, upon the proviso, was right? In other words, with what intention did Congress use the phrase, "*place where such bank is located?*" Did that word there signify the State, territory, or district, or did it signify the particular city, town, or village in which a National bank was located? The position of the learned counsel was in favor of the last view, and in support of it he submitted various propositions in opposition to the view of the court below.

If, then, the State act did not conform to the permission or proviso of the act of Congress, it mattered not whether Austin was or was not worse off than if it had conformed. The State act was void, and the assessment and tax laid under it was void also. And Austin had a right to have the judgment below reversed, in order that he might have a trial of his rights, without prejudice from any influence which an erroneous construction of an act of Congress might be presumed to have had on the court.

No argument on the other side.

Mr. Justice SWAYNE delivered the opinion of the court.

This case is brought before us by a writ of error, issued pursuant to the twenty-fifth section of the Judiciary Act of 1789.

The legislature of Massachusetts, by a statute passed on the 15th of May, 1865 (ch. 242), provided for "the taxation of shares in associations for banking, established under the laws of the United States," and prescribed the mode of procedure for that purpose. The statute is confined to such associations in that State, and to shares held by persons living within its limits. The third section enacts that the assessment for taxation shall be made where the shareholders reside.

The proviso in the act of Congress which permits the shares to be taxed by the States, requires them to be included "in the valuation of the personal property" of the holder, "in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere."* There are other regulations upon the subject, but they do not affect the point to be considered, and need not to be more particularly adverted to.

The plaintiff in error lived in Boston, and was the owner of stock in six National banks there situated, and the valuation and assessment were there made.

It is not denied that this was in conformity to the act of Congress, but it is insisted that the taxes assessed were illegal and void, because the statute of the State requires that they shall be assessed at the place of the residence of the shareholder, without reference to the locality of the bank.

The only question of Federal jurisdiction, and of which this court can take cognizance is, whether the plaintiff in error has been deprived of any right, contrary to the act of Congress, upon which he relies for protection.

The facts bring the case within the terms of the act, according to the strictest construction which can be given to them. This is conclusive of the case. Whether, in another

* Act of June 3, 1864, ch. 106, § 41, 13 Stat. at Large, 112.

case, arising upon a different state of facts, the statute may not produce results in conflict with the act of Congress, and which this court will therefore be bound to revise and correct, is an inquiry upon which we are not called to enter. We can only consider the statute in connection with the case before us. Having ascertained that it has wrought no effect which the act forbids, our jurisdiction is at an end. The twenty-fifth section of the Judiciary Act is explicit upon the subject.

The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

It is well settled that the States cannot exercise this authority in respect to any of the instrumentalities which the general government may create for the performance of its constitutional functions. It is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the law-making power of the nation; but the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.

In respect to the class of cases to which the one before us belongs, the waiver is expressed in clear and unmistakable language.

Important questions have arisen as to the construction and effect of the permission given to tax, by the act of Congress under consideration, with reference to the national securities held by the banks. These questions have been settled by this court in repeated decisions.*

In this case, the only question open for our examination must, for the reasons before stated, be resolved against the plaintiff in error.

JUDGMENT AFFIRMED.

* Van Allen v. The Assessors, 3 Wallace, 573; The People v. The Commissioners, 4 Id. 244; Bradley v. The People, Id. 459.

Syllabus.

TEXAS v. WHITE ET AL.

1. The word State describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country, or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
2. In the Constitution the term State most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.
3. But the term is also used to express the idea of a people or political community, as distinguished from the government. In this sense it is used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.
4. The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction, from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And, when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union."
5. But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. On the contrary, it may be not unreasonably said, that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.
6. When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.
7. Considered as transactions under the Constitution, the ordinance of secession, adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give

effect to that ordinance, were absolutely null. They were utterly without operation in law. The State did not cease to be a State, nor her citizens to be citizens of the Union.

8. But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.

9. While Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, no suit, instituted in her name, could be maintained in this court. It was necessary that the government and the people of the State should be restored to peaceful relations to the United States, under the Constitution, before such a suit could be prosecuted.

10. Authority to suppress rebellion is found in the power to suppress insurrection and carry on war; and authority to provide for the restoration of State governments, under the Constitution, when subverted and overthrown, is derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and, for the time, excludes the National authority from its limits, seems to be a necessary complement to the other.

11. When slavery was abolished, the new freemen necessarily became part of the people; and the people still constituted the State: for States, like individuals, retain their identity, though changed, to some extent, in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

12. In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

13. So long as the war continued, it cannot be denied that the President might institute temporary government within insurgent districts, occupied by the National forces, or take provisional measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws. But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress, though necessarily limited to cases where the rightful government is subverted by revolutionary violence, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

14. The several executives of Texas, partially, at least, reorganized under

the authority of the President and of Congress, having sanctioned this suit, the necessary conclusion is, that it was instituted and is prosecuted by competent authority.

15. Public property of a State, alienated during rebellion by an usurping State government for the purpose of carrying on war against the United States, may be reclaimed by a restored State government, organized in allegiance to the Union, for the benefit of the State.

16. Exact definitions, within which the acts of a State government, organized in hostility to the Constitution and government of the United States, must be treated as valid or invalid, need not be attempted. It may be said, however, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

17. Purchasers of United States bonds issued payable to the State of Texas or bearer, alienated during rebellion by the insurgent government, and acquired after the date at which the bonds became redeemable, are affected with notice of defect of title in the seller.

ON original bill.

The Constitution ordains that the judicial power of the United States shall extend to certain cases, and among them "to controversies between *a State and citizens of another State;* . . . and between a State, or the citizens thereof, and *foreign* States, citizens or subjects." It ordains further, that in cases in which "a State" shall be a party, the Supreme Court shall have original jurisdiction.

With these provisions in force as fundamental law, Texas, entitling herself "the State of Texas, one of the United States of America," filed, on the 15th of February, 1867, an original bill against different persons; White and Chiles, one Hardenberg, a certain firm, Birch, Murray & Co., and some others,* citizens of New York and other States; pray-

* These were Stewart, Shaw, &c., who made no resistance by counsel at the argument.

ing an injunction against their asking or receiving payment from the United States of certain bonds of the Federal government, known as Texan indemnity bonds; and that the bonds might be delivered up to the complainant, and for other and further relief.

The case was this:

In 1851 the United States issued its bonds—five thousand bonds for $1000 each, and numbered successively from No. 1 to No. 5000, and thus making the sum of $5,000,000—to the State of Texas, in arrangement of certain boundary claims made by that State. The bonds, which were dated January 1st, 1851, were coupon bonds, payable, by their terms, to the State of Texas or *bearer*, with interest at 5 per cent. semi-annually, and "*redeemable after* the 31st day of December, 1864." Each bond contained a statement on its face that the debt was authorized by act of Congress, and was "*transferable on delivery*," and to each were attached six-month coupons, extending to December 31, 1864.*

In pursuance of an act of the legislature of Texas, the controller of public accounts of the State was authorized to go to Washington, and to receive there the bonds; the statute making it his duty to deposit them, when received, in the treasury of the State of Texas, to be disposed of "*as may be provided by law;*" and enacting further, that no bond, issued as aforesaid and payable to bearer, should be "available in the hands of *any* holder until the same shall have been indorsed, *in the city of Austin, by the governor of the State of Texas.*"

Most of the bonds were indorsed and sold according to law, and paid on presentation by the United States prior to 1860. A part of them, however,—appropriated by act of legislature as a school fund—were still in the treasury of Texas, in January, 1861, when the late Southern rebellion broke out.

The part which Texas took in that event, and the position

* For a particular account of these bonds, see Paschal's Annotated Digest, Arts. 442–450.

in which the close of it left her, are necessary to be here adverted to.

At the time of that outbreak, Texas was confessedly one of the United States of America, having a State constitution in accordance with that of the United States, and represented by senators and representatives in the Congress at Washington. In January, 1861, a call for a convention of the people of the State was issued, signed by sixty-one individuals. The call was without authority and revolutionary. Under it delegates were elected from some sections of the State, whilst in others no vote was taken. These delegates assembled in State convention, and on the 1st of February, 1861, the convention adopted an ordinance "*to dissolve the union between the State of Texas and the other States, united under the compact styled, 'the Constitution of the United States of America.'*" The ordinance contained a provision requiring it to be submitted to the people of Texas, for ratification or rejection by the qualified voters thereof, on the 23d of February, 1861. The legislature of the State, convened in extra session, on the 22d of January, 1861, passed an act ratifying the election of the delegates, chosen in the irregular manner above mentioned, to the convention. The ordinance of secession submitted to the people was adopted by a vote of 34,794 against 11,235. The convention, which had adjourned immediately on passing the ordinance, reassembled. On the 4th of March, 1861, it declared that the ordinance of secession had been ratified by the people, and that Texas had withdrawn from the union of the States under the Federal Constitution. It also passed a resolution requiring the officers of the State government to take an oath to support the provisional government of the Confederate States, and providing, that if "any officer refused to take such oath, in the manner and within the time prescribed, his office should be deemed vacant, and the same filled as though he were dead." On the 16th of March, the convention passed an ordinance, declaring, that whereas the governor and the secretary of state had refused or omitted to take the oath prescribed, their offices were vacant; that

the lieutenant-governor should exercise the authority and perform the duties appertaining to the office of governor, and that the deposed officers should deliver to their successors in office the great seal of the State, and all papers, archives, and property in their possession belonging or appertaining to the State. The convention further assumed to exercise and administer the political power and authority of the State.

Thus was established the rebel government of Texas.

The senators and representatives of the State in Congress now withdrew from that body at Washington. Delegates were sent to the Congress of the so-called Confederate States at Montgomery, Alabama, and electors for a president and vice-president of these States appointed. War having become necessary to complete the purposed destruction by the South of the Federal government, Texas joined the other Southern States, and made war upon the United States, whose authority was now recognized in no manner within her borders. The oath of allegiance of all persons exercising public functions was to both the State of Texas, and to the Confederate States of America; and no officer of any kind representing the United States was within the limits of the State except military officers, who had been made prisoners. Such was and had been for several months the condition of things in the beginning of 1862.

On the 11th of January, of that year, the legislature of the usurping government of Texas passed an act—"*to provide arms and ammunition, and for the manufacture of arms and ordnance for the military defences of the State.*" And by it created a "military board," to carry out the purpose indicated in the title. Under the authority of this act, military forces were organized.

On the same day the legislature passed a further act, entitled "*An act to provide funds for military purposes,*" and therein directed the board, which it had previously organized, "*to dispose of any bonds and coupons which may be in the treasury on any account, and use such funds or their proceeds for the defence of the State;*" and passed an additional act *repealing the act*

which made an indorsement of the bonds by the governor of Texas necessary to make them available in the hands of the holder.

Under these acts, the military board, on the 12th January, 1865, a date at which the success of the Federal arms seemed probable, agreed to sell to White & Chiles one hundred and thirty-five of these bonds, then in the treasury of Texas, and seventy-six others deposited with certain bankers in England, in payment for which White & Chiles were to deliver to the board a large quantity of cotton cards and medicines. The former bonds were delivered to White & Chiles on the 15th March following, *none of them being indorsed by any governor of Texas.*

It appeared that in February, 1862, after the rebellion had broken out, it was made known to the Secretary of the Treasury of the United States, in writing, by the Hon. G. W. Paschal, of Texas, who had remained constant to the Union, that an effort would be made by the rebel authorities of Texas to use the bonds remaining in the treasury in aid of the rebellion; and that they could be identified, because all that had been circulated before the war were indorsed by different governors of Texas. The Secretary of the Treasury acted on this information, and refused in general to pay bonds that had not been indorsed. On the 4th of October, 1865, Mr. Paschal, as agent of the State of Texas, caused to appear in the money report and editorial of the New York Herald, a notice of the transaction between the rebel government of Texas and White & Chiles, and a statement that the treasury of the United States would not pay the bonds transferred to them by such usurping government. On the 10th October, 1865, the provisional governor of the State published in the New York Tribune, a "*Caution to the Public*," in which he recited that the rebel government of Texas had, under a pretended contract, transferred to White & Chiles "one hundred and thirty-five United States Texan indemnity bonds, issued January 1, 1851, payable in fourteen years, of the denomination of $1000 each, and coupons attached thereto to the amount of $1287.50, amounting in the aggregate, bonds and coupons, to the sum of $156,287.50."

His caution did not specify, however, any particular bonds by number. The caution went on to say that the transfer was a conspiracy between the rebel governor and White & Chiles to rob the State treasury, that White & Chiles had never paid the State one farthing, that they had fled the State, and that these facts had been made known to the Secretary of the Treasury of the United States. And "a protest was filed with him by Mr. Paschal, agent of the State of Texas, against the payment of the said bonds and coupons unless presented for payment by proper authority." The substance of this notice, it was testified, was published in money articles of many of the various newspapers of about that date, and that financial men in New York and other places spoke to Mr. Paschal, who had caused it to be inserted in the Tribune, about it. It was testified also, that after the commencement of the suit, White & Chiles said that they had seen it.

The rebel forces being disbanded on the 25th May, 1865, and the civil officers of the usurping government of Texas having fled from the country, the President, on the 17th June, 1865, issued his proclamation appointing Mr. A. J. Hamilton, provisional governor of the State; and directing the formation by the people of a State government in Texas.

Under the provisional government thus established, the people proceeded to make a constitution, and reconstruct their State government.

But much question arose as to what was thus done, and the State was not acknowledged by the Congress of the United States as being reconstructed. On the contrary, Congress passed, in March, 1867, three certain acts, known as the Reconstruction Acts. By the first of these, reciting that no legal State governments or adequate protection for life or property then existed in the rebel States of Texas, and nine other States named, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, Congress divided the States named into five *military districts* (Texas with Louisiana being the fifth), and made it the duty

of the President to assign to each *an officer of the army*, and to detail a sufficient military force to enable him to perform his duties and enforce authority within his district. The act made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, *either through the local civil tribunals or through military commissions*, which the act authorized. It provided, further, that when the people of any one of these States had formed a constitution in conformity with that of the United States, framed in a way which the statute went on to specify, and when the State had adopted a certain article of amendment named, to the Constitution of the United States, and when such article should have become a part of the Constitution of the United States, *then* that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

A State convention of 1866 passed an ordinance looking to the recovery of these bonds; and by act of October of that year, the governor of Texas was authorized to take such steps as he might deem best for the interests of the State in the matter; either to recover the bonds, or to compromise with holders. Under this act the governor appointed an agent of the State to look after the matter.

It was in this state of things, with the State government organized in the manner and with the *status* above mentioned, that this present bill was directed by this agent to be filed.

The bill was filed by Mr. R. T. Merrick and others, solicitors in this court, on behalf of the State, without *precedent* written warrant of attorney. But a letter from J. W. Throckmorton, elected governor under the constitution of 1866, ratified their act, and authorized them to prosecute

the suit. Mr. Paschal, who now appeared with the other counsel, in behalf of the State, had been appointed by Governor Hamilton to represent the State, and Mr. Pease, a subsequent governor, appointed by General Sheridan, commander under the reconstruction acts, renewed this appointment.

The bill set forth the issue and delivery of the bonds to the State, the fact that they were seized by a combination of persons in armed hostility to the government of the United States, sold by an organization styled the military board, to White & Chiles, for the purpose of aiding the overthrow of the Federal government; that White & Chiles had not performed what they agreed to do. It then set forth that they had transferred such and such numbers, specifying them, to Hardenberg, and such and such others to Birch, Murray & Co., &c.; that these transfers were not in good faith, but were with express notice on the part of the transferees of the manner in which the bonds had been obtained by White & Chiles; that the bonds were overdue at the time of the transfer; and that they had never been indorsed by any governor of Texas. The bill interrogated the defendants about all these particulars; requiring them to answer on oath; and, as already mentioned, it prayed an injunction against their asking, or receiving payment from the United States; that the bonds might be delivered to the State of Texas, and for other and further relief.

As respected White & Chiles, who had now largely parted with the bonds, the case rested much upon what precedes, and their own answers.

The answer of CHILES, declaring that he had none of the bonds in his possession, set forth:

1. That there was no sufficient authority shown to prosecute the suit in the name of Texas.

2. That Texas by her rebellious courses had so far changed her *status*, as one of the United States, as to be disqualified from suing in this court.

3. That whether the government of Texas, during the term in question, was one *de jure* or *de facto*, it had authorized the

military board to act for it, and that the State was estopped from denying its acts.

4. That no indorsement of the bonds was necessary, they having been negotiable paper.

5. That the articles which White & Chiles had agreed to give the State, were destroyed *in transitu*, by disbanded troops, who infested Texas, and that the loss of the articles was unavoidable.

The answer of WHITE went over some of the same ground with that of Chiles. He admitted, however, "that he was informed and believed that in all cases where any of the bonds were disposed of by him, it was known to the parties purchasing for themselves, or as agents for others, *that there was some embarrassment in obtaining payment of said bonds at the treasury of the United States, arising out of the title of this respondent and his co-defendant Chiles.*"

As respected HARDENBERG, the case seemed much thus:

In the beginning of November, 1866, *after* the date of the notices given through Mr. Paschal, one Hennessey, residing in New York, and carrying on an importing and commission business, then sold to Hardenberg thirty of these bonds, originally given to White and Chiles; and which thirty, a correspondent of his, long known to him, in Tennessee, had sent to him for sale. Hardenberg bought them "at the rate of 1.20 for the dollar on their face," and paid for them. Hennessey had "heard from somebody that there was some difficulty about the bonds being paid at the treasury, but did not remember whether he heard that before or after the sale."

Hardenberg also bought others of these bonds near the same time, at 1.15 per cent., under circumstances thus testified to by Mr. C. T. Lewis, a lawyer of New York:

"In conversation with Mr. Hardenberg, I had learned that he was interested in the Texas indemnity bonds, and meditated purchasing same. I was informed in Wall Street that such bonds were offered for sale by Kimball & Co., at a certain price, which price I cannot now recollect. I informed Mr. Hardenberg of this fact, and he requested me to secure the bonds for him at

that price. I went to C. H. Kimball & Co., and told them to send the bonds to Mr. Hardenberg's office and get a check for them, which I understand they did. *I remember expressing to Mr. Hardenberg the opinion that these bonds, being on their face negotiable by delivery, and payable in gold, must, at no distant day, be redeemed according to their tenor, and were, therefore, a good purchase at the price at which they were offered.*

"My impression is, that *before* this negotiation I had read a paragraph in some New York newspaper, stating that the payment of the whole issue of the Texas indemnity bonds was suspended until the history of a certain portion of the issue, supposed to have been negotiated for the benefit of the rebel service, should be understood. I am not at all certain whether I read this publication before or after the date of the transaction. *If the publication was made before this transaction I had probably read the article before the purchase was made.* My impression is, that it was a paragraph in a money article, but I attributed no great importance to it. I acted in this matter simply as the friend of Mr. Hardenberg, and received no commission for my services. I am a lawyer by profession, and not a broker."

Kimball & Co. (the brokers thus above referred to by Mr. Lewis), testified that they had received the bonds thus sold, from a firm which they named, "in perfect good faith, and sold them in like good faith, as we would any other lot of bonds received from a reputable house." It appeared, however, that in sending the bonds to Kimball & Co., for sale, the firm had requested that they might not be known in the transaction.

Hardenberg's own account of the matter, as declared by his answer, was thus:

"That he was a merchant in the city of New York; that he purchased the bonds held by him in open market in said city; that the parties from whom he purchased the same were responsible persons, residing and doing business in said city; that he purchased of McKim, Brothers & Co., bankers in good standing in Wall Street, one bond at 1.15 per cent., on the 6th of November, 1866, when gold was at the rate of $1.47\frac{1}{4}$, and declining; that when he purchased the same he made no inquiries of

McKim, Brothers & Co., but took the bonds on his own observation of their plain tenor and effect at what he conceived to be a good bargain; that afterwards, and before the payment of said bonds and coupons by the Secretary of the Treasury, and at the request of the Comptroller, Hon. R. W. Tayler, he made inquiry of said firm of McKim, Brothers & Co., and they informed him that said bonds and coupons had been sent to them to be sold by the First National Bank of Wilmington, North Carolina; that he purchased on the 8th of November, 1866, thirty of said bonds, amounting to the sum of $32,475, of J. S. Hennessey, 29 Warren Street, New York City, doing business as a commission merchant, who informed him that, in the way of business, they were sent him by Hugh Douglas, of Nashville, Tennessee; that he paid at the rate of 120 cents at a time, to wit, the 8th of November, 1866, when gold was selling at 146 and declining; that the three other bonds were purchased by him on the 8th of November, 1866, of C. H. Kimball & Co., 30 Broad Street, brokers in good standing, who informed him, on inquiry afterwards, that said bonds were handed them to be sold by a banking house in New York of the highest respectability, who owned the same, but whose names were not given, as the said firm informed him they could 'see no reason for divulging private transactions;' and that he paid for last-mentioned bonds at the rate of 120 cents, on said 8th day of November, 1866, when gold was selling at 146 and declining.

"Further answering, he saith that he had no knowledge at the time of said purchase, that the bonds were obtained from the State of Texas, or were claimed by the said State; that he acted on information obtained from the public report of the Secretary of the Treasury, showing that a large portion of similar bonds had been redeemed, and upon his own judgment of the nature of the obligation expressed by the bonds themselves, and upon his own faith in the full redemption of said bonds; and he averred that he had no knowledge of the contract referred to in the bill of complaint, nor of the interest or relation of White & Chiles, nor of any connection which they had with said complainant, or said bonds, nor of the law of the State of Texas requiring indorsement."

The answer of White mentioned, in regard to Hardenberg's bonds, that they were sold by his (White's) broker;

that he, White, had no knowledge of the name of the real purchaser, who, however, paid 115 per cent. for them; "that at the time of the sale, his (White's) broker informed him that the purchaser, or the person acting for the purchaser, did not want any introduction to the respondent, and required no history of the bonds proposed to be sold; that he only desired that they should come to him through the hands of a loyal person, who had never been identified with the rebellion."

Another matter, important possibly in reference to the relief asked by the bill, and to the exact decree* made, should, perhaps, be mentioned about these bonds of Hardenberg.

The answer of Hardenberg stated, that "on the 16th of February, 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the *same were paid* on that day." This was literally true; and the books of the treasury showed these bonds as among the redeemed bonds; and showed nothing else. As a matter of fact, it appeared that the agents of Texas on the one hand, urging the government not to pay the bonds, and the holders, on the other, pressing for payment—it being insisted by these last that the United States had no right to withhold the money, and thus deprive the holder of the bonds of interest—the Controller of the Treasury, Mr. Tayler, made a report, on the 29th of January, 1867, to the Secretary of the Treasury, in which he mentioned, that it seemed to be agreed by the agents of the State, that her case depended on her ability to show a want of good faith on the part of the holders of bonds; and that he had stated to the agents, that as considerable delay had already been incurred, he would, unless during the succeeding week they took proper legal steps against the holders, feel it his duty to pay such bonds as were unimpeached in title in the holders' hands. He accordingly recommended to the secretary payment of Hardenberg's and of some others. The agents, on the same day that the controller made his report,

* See this last, *infra*, foot of p. 742.

and after he had written most of it, informed him that they would take legal proceedings on behalf of the State; and were informed in turn that the report would be made on that day, and would embrace Hardenberg's bonds. Two days afterwards a personal action was commenced, in the name of the State of Texas, against Mr. McCulloch, the then Secretary of the Treasury, for the detention of the bonds of Hardenberg and others. This action was dismissed February 19th. On the 15th of the same February, the present bill was filed. On the 16th of the month, the personal suit against the secretary having at the time, as already above stated, been withdrawn, and *no process under the present bill having then, nor until the 27th following, been served on Hardenberg*, Mr. Tayler, Controller of the Treasury, and one Cox, the agent of Hardenberg, entered into an arrangement, by which it was agreed that this agent should deposit with Mr. Tayler government notes known as "seven-thirties," equivalent in value to the bonds and coupons held by Hardenberg; to be held by Mr. Tayler "as indemnity for Mr. McCulloch, against any personal damage, loss, and expense in which he may be involved by reason of the payment of the bonds." The seven-thirties were then delivered to Mr. Tayler, and a check in coin for the amount of the bonds and interest was delivered to Hardenberg's agent. The seven-thirties were subsequently converted into the bonds called "five-twenties," and these remained in the hands of Mr. Tayler, being registered in his name as trustee. The books of the treasury showed nothing in relation to this trust; nor, as already said, anything more or other than that the bonds were paid to Hardenberg or his agent.

Next, as respected the bonds of BIRCH, MURRAY & Co. It seemed in regard to these, *that prior to July*, 1855, Chiles wanting money, applied to this firm, who lent him $5000, on a deposit of *twelve* of the bonds. The whole of the twelve were taken to the treasury department. The department at first declined to pay them, but finally did pay

four of them (amounting with the coupons to $4900), upon the ground urged by the firm, that it had lent the $5000 to Chiles on the hypothecation of the bonds and coupons without knowledge of the claim of the State of Texas, and because the firm was urged to be, and was apparently, a holder in good faith, and for value; the other bonds, eight in number, remaining in the treasury, and not paid to the firm, because of the alleged claim of the State of Texas; and of the allegation that the same had come into the possession of said White and Chiles improperly, and without consideration.

The difficulty now was less perhaps about the four bonds, than about these eight, whose further history was thus presented by the answer of Birch, one of the firm, to the bill. He said in this answer, and after mentioning his getting with difficulty the payment of the four bonds—

"That *afterwards, and during the year* 1866, Chiles called upon him with the printed report of the First Comptroller of the Treasury, Hon. R. W. Tayler, from which it appeared that the department would, in all reasonable probability, redeem all said bonds; and requested further advances on said eight remaining bonds; and that the firm thereupon advanced said Chiles, upon the said eight bonds, from time to time, the sum of $4185.25, all of which was due and unpaid. That he made the said advances as well upon the representations of said Chiles that he was the *bonâ fide* holder of said bonds and coupons, as upon his own observation and knowledge of their legal tenor and effect; and of his faith in the redemption thereof by the government of the United States."

The answer said further, that—

"At the time of the advances first made, the firm had no knowledge of the contract referred to in the bill; nor of the interest or connection of said White & Chiles with the complainant, nor of the law of the State of Texas referred to in the bill passed December 16, 1851; and that the bonds were taken in good faith."

It appeared further, in regard to the whole of these bonds,

that, in *June*, 1865, Chiles, wanting to borrow money of one Barret, and he, Barret, knowing Mr. Hamilton, just then appointed provisional governor, but not yet installed into office, nor apparently as yet having the impressions which he afterwards by his caution made public, went to him, supposing him well acquainted with the nature of these bonds, and sought his opinion as to their value, and as to whether they would be paid. Barret's testimony proceeded:

"He advised me to accept the proposition of Chiles, and gave it as his opinion that the government would *have* to pay the bonds. I afterwards had several conversations with him on the subject, in all of which he gave the same opinion. Afterwards, (*I can't remember the exact time*), Mr. Chiles applied to Birch, Murray & Co. for a loan of money, proposing to give some bonds as collateral security; and at his request I went to Birch, Murray & Co., and informed them of my conversations with Governor Hamilton, and of his opinion as expressed to me. They then seemed willing to make a loan on the security offered. In order to give them further assurance that I was not mistaken in my report of Governor Hamilton's opinion verbally expressed, I obtained from him a letter [letter produced]. It reads thus:

NEW YORK, June 25th, 1865.

HON. J. R. BARRET.

DEAR SIR: In reply to your question about Texas indemnity bonds issued by the U. S., I can assure you that they are perfectly good, and the gov't will certainly pay them to the holders.

Yours truly,

A. J. HAMILTON."

The witness "mentioned the conversations had with Governor Hamilton, and also spoke of the letter, and sometimes read it to various parties, some of whom were dealing in these bonds," and, as he stated, had "reason to believe that Governor Hamilton's opinion in regard to the bonds became pretty generally known among dealers in such paper." The witness, however, did not know Mr. Hardenberg.

The questions, therefore, were:

1. A minor preliminary one; the question presented by Chiles's answer, as to whether sufficient authority was shown

for the prosecution of the suit in the name and in behalf of Texas.

2. A great and principal one; a question of jurisdiction, viz., whether Texas, at the time of the bill filed or now, was one of the United States of America, and so competent to file an original bill here.

3. Assuming that she was, a question whether the respective defendants, any, all, or who of them, were proper subjects for the injunction prayed, as holding the bonds without sufficient title, and herein—and more particularly as respected Hardenberg, and Birch, Murray & Co.—a question of negotiable paper, and the extent to which holders, asserting themselves holders *bonâ fide* and for value, of paper payable "to bearer," held it discharged of precedent equities.

4. A question as to the effect of the payments, at the treasury, of the bonds of Hardenberg and of the four bonds of Birch, Murray & Co.

The case was argued by Messrs. Paschal and Merrick, in behalf of Texas; and contra, by Mr. Phillips, for White; Mr. Pike, for Chiles; Mr. Carlisle, for Hardenberg; and Mr. Moore, for Birch, Murray & Co.

The CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, $10,000,000 in five per cent. bonds, each for the sum of $1000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the National treasury, and the other half were delivered to the State. The bonds thus de-

livered were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the State.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor,* and on the same day provided for the organization of a military board, composed of the governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury, upon any account, to the extent of $1,000,000.† The defence contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by

* Acts of Texas, 1862, p. 45. † Texas Laws, 55.

counsel, arose upon the allegations of the answer of Chiles (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the State legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a State of the Union at the time of these acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge,* in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

* Mr. Justice Paterson, in Penhallow v. Doane's Admrs., 3 Dallas, 93.

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said.

The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February,* a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be "a separate and sovereign State," and "her people and citizens" to be "absolved from all allegiance to the United States, or the government thereof."

It was ordered by a vote of the convention† and by an act of the legislature,‡ that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the convention of seceding States at Montgomery, "in order," as the resolution declared, "that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention."

Before the passage of this resolution the convention had

* Paschal's Digest Laws of Texas, 78.

† Id. 80.

‡ Laws of Texas, 1859–61, p. 11.

appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the National troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State.* Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was organized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners.†

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State constitution which this adhesion made necessary. The words "United States," were stricken out wherever they occurred, and the words "Confederate States" substituted; and the members of the legislature, and all officers of the State, were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy.

Before, indeed, these changes in the constitution had been

* Paschal's Digest, 80.

† Texas Reports of the Committee (Library of Congress), 45.

completed, the officers of the State had been required to appear before the committee and take an oath of allegiance to the Confederate States.

The governor and secretary of state, refusing to comply, were summarily ejected from office.

The members of the legislature, which had also adjourned and reassembled on the 18th of March, were more compliant. They took the oath, and proceeded on the 8th of April to provide by law for the choice of electors of president and vice-president of the Confederate States.

The representatives of the State in the Congress of the United States were withdrawn, and as soon as the seceded States became organized under a constitution, Texas sent senators and representatives to the Confederate Congress.

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and

arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States."* Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

* County of Lane v. The State of Oregon, *supra*, p. 76.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National

government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of govern-

ment. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty* by President Lincoln, in December, 1863, and by President Johnson in May, 1865.† And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States.‡

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some

* 13 Stat. at Large, 737. † Ib. 758. ‡ Ib. 774–5.

extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to deter-

mine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island,* arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruc-

* Luther v. Borden, 7 Howard, 42.

tion Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But, it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867,* the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the

* 14 Stat. at Large, 428.

three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence.

And the first question to be answered is, whether or not the title of the State to the bonds in controversy was divested by the contract of the military board with White and Chiles?

That the bonds were the property of the State of Texas on the 11th of January, 1862, when the act prohibiting alienation without the indorsement of the governor, was repealed, admits of no question, and is not denied. They came into her possession and ownership through public acts of the general government and of the State, which gave notice to all the world of the transaction consummated by them. And, we think it clear that, if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation, in disregard of such restrictions, can convey no title to the alienee.

In this case, however, it is said that the restriction imposed by the act of 1851 was repealed by the act of 1862. And this is true if the act of 1862 can be regarded as valid. But, was it valid?

The legislature of Texas, at the time of the repeal, constituted one of the departments of a State government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful

acts. And, yet, it is an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

What, then, tried by these general tests, was the character of the contract of the military board with White and Chiles?

That board, as we have seen, was organized, not for the defence of the State against a foreign invasion, or for its protection against domestic violence, within the meaning of these words as used in the National Constitution, but for the purpose, under the name of defence, of levying war against the United States. This purpose was, undoubtedly, unlawful, for the acts which it contemplated are, within the express definition of the Constitution, treasonable.

It is true that the military board was subsequently reorganized. It consisted, thereafter, of the governor and two other members, appointed and removable by him; and was, therefore, entirely subordinate to executive control. Its general object remained without change, but its powers were "extended to the control of all public works and supplies, and to the aid of producing within the State, by the importation of articles necessary and proper for such aid."

And it was insisted in argument on behalf of some of the defendants, that the contract with White and Chiles, being for the purchase of cotton-cards and medicines, was not a contract in aid of the rebellion, but for obtaining goods capable of a use entirely legitimate and innocent, and, therefore, that payment for those goods by the transfer of any property of the State was not unlawful. We cannot adopt this view. Without entering, at this time, upon the inquiry whether any contract made by such a board can be sustained, we are obliged to say that the enlarged powers of the board appear to us to have been conferred in furtherance of its main purpose, of war against the United States, and that the contract, under consideration, even if made in the execution of these enlarged powers, was still a contract in aid of the rebellion, and, therefore, void. And we cannot shut our eyes to the evidence which proves that the act of repeal was intended to aid rebellion by facilitating the transfer of these bonds. It was supposed, doubtless, that negotiation of them would be less difficult if they bore upon their face no direct evidence of having come from the possession of any insurgent State government. We can give no effect, therefore, to this repealing act.

It follows that the title of the State was not divested by the act of the insurgent government in entering into this contract.

But it was insisted further, in behalf of those defendants who claim certain of these bonds by purchase, or as collateral security, that however unlawful may have been the means by which White and Chiles obtained possession of the bonds,

they are innocent holders, without notice, and entitled to protection as such under the rules which apply to securities which pass by delivery. These rules were fully discussed in *Murray* v. *Lardner*.* We held in that case that the purchaser of coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller, and that the burden of proof in respect to notice and want of good faith, is on the claimant of the bonds as against the purchaser. We are entirely satisfied with this doctrine.

Does the State, then, show affirmatively notice to these defendants of want of title to the bonds in White and Chiles?

It would be difficult to give a negative answer to this question if there were no other proof than the legislative acts of Texas. But there is other evidence which might fairly be held to be sufficient proof of notice, if the rule to which we have adverted could be properly applied to this case.

But these rules have never been applied to matured obligations. Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors.†

The bonds in question were dated January 1, 1851, and were redeemable after the 31st of December, 1864. In strictness, it is true they were not payable on the day when they became redeemable; but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law, and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made.

Now, all the bonds in controversy had become redeemable before the date of the contract with White and Chiles; and all bonds of the same issue which have the indorsement of

* 2 Wallace, 118.

† Brown v. Davies, 8 Term, 80; Goodman v. Simonds, 20 Howard, 366.

a governor of Texas made before the date of the secession ordinance,—and there were no others indorsed by any governor,—had been paid in coin on presentation at the Treasury Department; while, on the contrary, applications for the payment of bonds, without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied.

As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought in fact, and under the circumstances could only have been bought, upon speculation. The purchasers took the risk of a bad title, hoping, doubtless, that through the action of the National government, or of the government of Texas, it might be converted into a good one.

And it is true that the first provisional governor of Texas encouraged the expectation that these bonds would be ultimately paid to the holders. But he was not authorized to make any engagement in behalf of the State, and in fact made none. It is true, also, that the Treasury Department, influenced perhaps by these representations, departed to some extent from its original rule, and paid bonds held by some of the defendants without the required indorsement. But it is clear that this change in the action of the department could not affect the rights of Texas as a State of the Union, having a government acknowledging her obligations to the National Constitution.

It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the State, purchasers could acquire none through them.

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.*

* See the decree, *infra*, p. 741.

Mr. Justice GRIER, dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case.

The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as *a political fact*, not as a *legal fiction*. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by Chief Justice Marshall, in the case of *Hepburn & Dundass* v. *Ellzey*.* As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says:

"The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a 'State' according to the

* 2 Cranch, 452.

definition of writers on general law. This is true; but as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy *only* are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one representative. 'The Senate of the United States shall be composed of two senators from each State.' Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dacotah is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting *as a fact* the present *status* of Texas as a State not in the Union *politically*, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to *the fact* as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. *Politically*, Texas is not *a State in this Union.* Whether rightfully out of it or not is a question not before the court.

But conceding now the fact to be as judicially assumed by my brethren, the next question is, whether she has a right to repudiate her contracts? Before proceeding to answer this question, we must notice a fact in this case that was forgotten in the argument. I mean that the United States are no party to this suit, and refusing to pay the bonds because the money paid would be used to advance the interests of the rebellion. It is a matter of utter insignificance to the government of the United States to whom she makes the payment of these bonds. They are payable to the bearer. The government is not bound to inquire into the *bonâ fides* of the holder, nor whether the State of Taxes has parted with the bonds wisely or foolishly. And although by the Reconstruction Acts she is required to repudiate all debts contracted for the purposes of the rebellion, this does not annul all acts of the State government during the rebellion, or contracts for other purposes, nor authorize the State to repudiate them.

Now, whether we assume the State of Texas to be judicially in the Union (though actually out of it) or not, it will not alter the case. The contest now is between the State of Texas and her own citizens. She seeks to annul a con-

tract with the respondents, based on the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion. Having relied upon one fiction, namely, that she *is* a State in the Union, she now relies upon a second one, which she wishes this court to adopt, that she was not a State at all during the five years that she was in rebellion. She now sets up the plea of *insanity*, and asks the court to treat all her acts made during the disease as void.

We have had some very astute logic to prove that judicially she was not a State at all, although governed by her own legislature and executive as "a distinct political body."

The ordinance of secession was adopted by the convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, "by battle,"* as to her right to secede, has been against her. But that verdict did not settle any question not involved in the case. It did not settle the question of her right to plead insanity and set aside all her contracts, made during the pending of the trial, with her own citizens, for food, clothing, or medicines. The same "organized political body," exercising the sovereign power of the State, which required the indorsement of these bonds by the governor, also passed the laws authorizing the disposal of them without such indorsement. She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions, that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be "an organized political body," exercising all the powers and functions of an independent sovereign State. Whether a State *de facto* or *de jure*, she is estopped from denying her identity in disputes with her own citizens. If they have not fulfilled their

* Prize Cases, 2 Black, 673.

contract, she can have her legal remedy for the breach of it in her own courts.

But the case of Hardenberg differs from that of the other defendants. He purchased the bonds in open market, *bonâ fide*, and for a full consideration. Now, it is to be observed that these bonds are payable to bearer, and that this court is appealed to as a court of equity. The argument to justify a decree in favor of the commonwealth of Texas as against Hardenberg, is simply this: these bonds, though payable to bearer, are redeemable fourteen years from date. The government has exercised her privilege of paying the interest for a term without redeeming the principal, which gives an additional value to the bonds. *Ergo*, the bonds are dishonored. *Ergo*, the former owner has a right to resume the possession of them, and reclaim them from a *bonâ fide* owner by a decree of a court of equity.

This is the legal argument, when put in the form of a logical sorites, by which Texas invokes our aid to assist her in the perpetration of this great wrong.

A court of chancery is said to be a court of conscience; and however astute may be the argument introduced to *defend* this decree, I can only say that neither my reason nor my conscience can give assent to it.

Mr. Justice SWAYNE:

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

THE DECREE.

The decree overruled the objection interposed by way of plea, in the answer of defendants to the authority of the solicitors of

the complainant to institute this suit, and to the right of Texas, as one of the States of the National Union, to bring a bill in this court.

It declared the contract of 12th January, 1865, between the Military Board and White and Chiles void, and enjoined White and Chiles from asserting any claim under it, and decreed that the complainant was entitled to receive the bonds and coupons mentioned in the contract, as having been transferred or sold to White and Chiles, which, at the several times of service of process, in this suit, were in the possession, or under the control of the defendants respectively, and any proceeds thereof which had come into such possession or control, with notice of the equity of the complainant.

It enjoined White, Chiles, Hardenberg, Birch, Murray, Jr., and other defendants, from setting up any claim to any of the bonds and coupons attached, described in the first article of said contract, and that the complainant was entitled to restitution of such of the bonds and coupons and proceeds as had come into the possession or control of the defendants respectively.

And the court, proceeding to determine for which and how many bonds the defendants respectively were accountable to make restitution of, or make good the proceeds of, decreed that Birch and Murray were so accountable for eight, numbered in a way stated in the decree, with coupons attached; and one Stewart (a defendant mentioned in the note at page 702), accountable for four others, of which the numbers were given, with coupons; decreed that Birch and Murray, as also Stewart, should deliver to the complainant the bonds for which they were thus made accountable, with the coupons, and execute all necessary transfers and instruments, and that payment of those bonds, or any of them, by the Secretary of the Treasury, to the complainant, should be an acquittance of Birch and Murray, and of Stewart, to that extent, and that for such payment this decree should be sufficient warrant to the secretary.

And, it appearing—the decree went on to say—upon the pleadings and proofs, that before the filing of the bill, Birch and Murray had received and collected from the United States the full amount of four other bonds, numbered, &c., and that Hardenberg, before the commencement of the suit, had deposited thirty-four bonds, numbered, &c., in the Treasury Department for redemption, of which bonds he claimed to have received payment

from the Secretary of the Treasury before the service of process upon him in this suit, in respect to which payment and the effect thereof the counsel for the said Birch and Murray, and for the said Hardenberg respectively, desired to be heard, it was ordered that time for such hearing should be given to the said parties.

Both the complainant and the defendants had liberty to apply for further directions in respect to the execution of the decree.

ROLAND v. UNITED STATES.

A grant of land in California, purporting to have been made by Governor Pio Pico, on the 2d of May, 1846, and insufficient on the archive papers, decided not to be helped by papers produced by the claimant; these being found by the court, upon the evidence in the case, not genuine, but an afterthought, and produced in court only because the growth of California had stimulated the cupidity of speculators to experiment with fragments of title-papers left unfinished by Pico, and which were gathered up by our officers on the conquest of the country.

APPEAL from the District Court for the Northern District of California, respecting a land claim, under the act of March 3d, 1851. The grant purported to have been made on the 2d of May, 1846, by Pio Pico; Moreno being secretary *ad interim;* this court having decided that, after the 7th July, 1846, Pico had no powers as governor. The claim was for "eleven leagues of land in California, at the junction of the San Joaquin and Stanislaus rivers." The expediente was obtained from the archives, and was among the papers of which Hartwell made an index. It consisted of a petition, marginal order that the title issue, decree of concession, and the borrador, or draft, of the title, to be given to the party interested. It differed from other expedientes in this: that there was no report, no diseño, no approval by the Departmental Assembly, and because the whole proceedings were begun and consummated on the same day. This document not being enough to establish the title, the claimant, in order to make it complete, produced from his own custody

the titulo which annexed conditions to the grant; a petition asking for further time to comply with these conditions; the order of the governor granting the request, and a certificate that the Departmental Assembly approved the grant.

In the borrador, the land was described "as eleven leagues, situated on the banks of the rivers Stanislaus and San Joaquin," corresponding with the description given in the petition. The titulo, issued on the same day as the borrador, directed "that the measurement of the eleven leagues shall be on the banks of the Stanislaus, of the width of one league, commencing where the two rivers run."

The signature, "Pio Pico," to the grant in this case had a different aspect, in certain particulars, from other signatures to public documents of the same governor; especially in the letter P.

Pico and Moreno were examined as witnesses. Pico testified that he believed that the signature to the grant, purporting to be his, was his; and he thought that the one purporting to be Moreno's was Moreno's. As to the one purporting to be his own, and the difference between it and some singatures admitted, he said that he "was accustomed to sign his name sometimes in one way and sometimes in another." He could not tell whether he had signed any document at a date different from that which the document bore, but he believed that he had not; he had no recollection when he signed this document; he believed that he had made no grants after 1846, but did not remember when, in 1846, he ceased making them. He might have made, elsewhere than in Los Angeles, grants dated as if there made; but he was positive that he signed none of the papers in this case in 1847 or 1848. He had no recollection of anything connected with this particular grant; and "none whatever" of Roland's application. He knew Roland, however, and had known him since 1840; thought that he was naturalized; he remembered, at all events, that he had married a Mexican woman; there was no particular reason, he testified, for granting so much as eleven leagues to Roland, "except that he was an honest man, had a family and considerable prop-

erty." The law, as he considered, imposed no limits; but eleven leagues was his limit in fact.

Moreno testified that he believed the signature of Pico to be genuine. He remembered that Roland "petitioned *for lands*" during the short time that he, Moreno, was secretary, and that they were granted to him; but he did not recollect the time when, or the circumstances under which the grant now set up was made; but he stated that, in 1846, the country was generally in a state of agitation, and that great confusion prevailed in all the public offices. The record contained a certificate from Pio Pico, that the Departmental Assembly met on the 4th day of May, 1846, and approved this grant. It appeared, however, from the journals of the Departmental Assembly, that the earliest meeting in May was on the 8th of May, *when minutes of the 29th of April were read and approved.* Pico, in his testimony given, accounted, or attempted to account for this by saying that at that time "there was great informality in all public affairs, and that it might have been that the notes of the meeting of the 4th were lost or mislaid; that they might have been left on the table, and only the draft of the 29th April been delivered to the secretary, to be copied into the book." He had no recollection that the grant was approved by the Departmental Assembly, or of his giving a certificate that it had been; nor any reason whatever for believing that it had been, except his seeing what he was positively sure was his own certificate that it was.

Some slight omissions and discrepancies were also pointed out in the journal.

It was admitted by an agreement of record, as a fact, that on the 22d day of July, 1845, Governor Pico granted to Roland and one Julius Horkman, four leagues of land, and that the claim had been prosecuted and confirmed. And that on the 6th day of May, 1846, he granted to Roland and one Louis Avenas, the sobrantes of certain ranchos, to the extent of nine leagues. This grant had been presented for confirmation, and was now pending in the District Court of California.

The District Court rejected the claim, and the claimant now appealed here; the question at issue being whether the title here set up was a genuine title to land in California acquired under Mexican rule, which this government was under obligations to protect?

Messrs. Carlisle and Black, for the appellant, citing *United States* v. *Johnson.**

Mr. Evarts, Attorney-General, and *Mr. Wills, contra*, who relied largely on *White* v. *United States*,† and *Pico* v. *Same*.‡

Mr. Justice DAVIS delivered the opinion of the court.

The haste and recklessness, to use no harsher term, with which this grant was made, cannot but suggest grave doubts of the *bonâ fides* of the transaction. It nowhere appears that Roland had any claim on the bounty of the Mexican nation, or ability, or intention to occupy so large a tract of country; and yet Pico, near the time when power passed from his hands, in the midst of civil commotion, disregarding the customary and established modes of making concession of the public domain to meritorious persons; without an informe; without a map; without any inquiry whatever; grants to him eleven leagues of land (the maximum quantity grantable to a single person) in a remote wilderness, occupied by hostile Indians, and of which so little was known that the best description that could be given of it was, that it was situated on the banks of the San Joaquin and Stanislaus rivers.

That the plain requirements of the Mexican colonization laws were violated in these proceedings, is very apparent from the frequent decisions of this court in this class of cases; but it is unnecessary to examine the effect of this departure on this title, if it were genuine, because in our opinion it has no validity. And it is not the first time, in the history of California land cases in this court, that grants made at or

* 1 Wallace, 826. † Ib. 660. ‡ 2 Id. 279.

near the time of the one in controversy purports to be made by Governor Pico, and countersigned by his secretary, Moreno, have been held not to be genuine.*

The struggle in this case, as in others of like character, is to make up by parol proof for a deficiency of record evidence. Pico and Moreno have been examined in support of the title, but their testimony is singularly unsatisfactory. Pico has no recollection of making the grant, nor, indeed, of Roland's application, but is able to identify his signatures. Although he knew Roland—that he had married a Mexican woman, the number of his children, and the state of his property—yet he cannot recollect that he donated to him an immense tract in a remote part of the country, and broke through all the forms of law in order to do it quickly.

A transaction of this magnitude, where the favored party was known, is not apt to be forgotten, and to say the least on the subject, this want of memory on Pico's part, is in itself a circumstance of great suspicion that the grant was never made. Moreno's memory, if somewhat better than Pico's, is not enough so to clear away the difficulties from this title.

It is a little singular, if Pico's signatures to the papers produced by the claimant are authentic, that they should differ so materially from his signatures to public documents of that date. In *Luco* v. *The United States*,† the same differences existed, and the court adopted the conclusion that they were not genuine. If these inequalities in Pico's signatures create distrust as to their genuineness, the different phraseology in describing the land in the borrador, from that used in the titulo, increases the distrust in the authenticity of this title.

In the borrador the land is described "as eleven leagues, situated on the banks of the rivers Stanislaus and San Joaquin," corresponding with the description given in the peti-

* Knight's Case, 1 Black, 227; Galbraith's Case, 2 Id. 394; Luco's Case, 23 Howard, 543.

† 23 Howard, 543.

tion, while the titulo, issued on the same day as the borrador, directs "that the measurement of the eleven leagues shall be on the banks of the Stanislaus, of the width of one league, commencing where the two rivers run." On the theory that the borrador and titulo were actually signed on the same day, how did it come to pass that the designation of the tract is so much more particular in the one than in the other? It will be borne in mind that Pico and Moreno have no definite recollection concerning this grant, and yet in this most important point the title-paper issued to the claimant differs essentially from the one which forms part of the expediente. Why think of the *necessity* of this change of description, when both documents were made on the same day, and form part of the same transaction? The change of description cannot be explained on the hypothesis that both papers were prepared and executed on the same day; but it is easily understood, if the titulo was prepared at a subsequent date, when the parties interested could see that a more definite description was wanting, than that which the borrador furnished.

But there are much graver difficulties affecting this title than those which we have noticed.

The claimant, in attempting to prove too much, has established the falsity of his title. This court has frequently decided, that the approval by the Departmental Assembly was not necessary to the validity of a grant; but has also observed that, under certain circumstances, the absence of such approval is entitled to great weight. It was, doubtless, with a view to meet all objections, and to show the fulness of his title, that the claimant furnished evidence that the Assembly did approve the grant. If this evidence is true, it strengthens the claimant's title, but if false, it destroys all confidence in it. It is important therefore to ascertain whether the Assembly met on the 4th day of May, 1846. Pico certifies that it did meet on that day, and approved this grant; but it is clear that very little reliance can be placed on this certificate, if genuine, because, when interrogated on the subject, Pico testifies that he has no recollection of the approval, nor, indeed, of giving a certificate to that effect, and but for the

fact that he sees his signature to the certificate of approval, he has no reason to believe that the grant was approved. It is true he testifies that there was great looseness in the administration of public affairs at the time; but from this no inference can be properly drawn that the Departmental Assembly convened on the 4th day of May, 1846. It will not do to say that there might have been a meeting of that body on that day. In the absence of direct proof of the fact, there must be evidence affording reasonable grounds to believe that the meeting actually took place, and that the records of it are lost. But we are not left, in this case, to rely on conjectures or probabilities, for, fortunately, the journals of the Departmental Assembly have been preserved, and they show that the body was not in session at the date when the testimonio states the grant to have been approved. It appears by the journals that the earliest meeting in May was the 8th day of the month, when the minutes of the meeting held on the 29th day of the preceding month of April, as was customary, were read and approved.

It is not credible that the Assembly could have met between these dates, and overlooked the fact in recording the proceedings of the 8th of May.

To escape the force of this evidence, the claimant has pointed out some discrepancies and omissions in the journals, but they are not of a character requiring notice, and do not tend to prove that the Assembly convened on the day when the testimonio purports to have been signed.

If Pico does not remember the sale of this large tract of country, nor the fact of approval by the Assembly, of what value is his testimony that the approval must have been obtained, because the document certifying to it bears his signature?

But if what has been said is not enough to show that the alleged grant was not issued to Roland, there is still further evidence in the record, which is conclusive on the point.

In deciding this case we are to be governed by the laws and usages of the Mexican government, in granting lands, before the conquest of California, and according to the prin-

ciples of equity. Tested by these rules, this claim has neither a legal or equitable status.

Lands were to be granted by the colonization laws of Mexico, for the purpose of cultivating and inhabiting them, and no more than eleven leagues could be granted to a single individual. It is stipulated in the record that, on the 22d day of July, 1845, Governor Pico granted to John Roland and Julius Horkman, four leagues of land, and that the claim has been prosecuted and confirmed. And that on the 6th day of May, 1846, only four days after the date of the grant in controversy, a still further grant was made to John Roland and Louis Arenas, of the sobrantes of certain ranchos, to the extent of nine leagues. This latter grant is also claimed to be genuine, and has been presented for confirmation, and is now pending in the District Court of California. All these grants cannot be sustained, because Pico had no power to make them. If they could be sustained Roland would receive from the Mexican government (if the surplus lands of the ranchos reached nine leagues) a quantity of land exceeding seventeen leagues. The United States are under no obligations to recognize grants which aggregate, in the hands of one person, such a quantity of land, even if they were actually made; but the strong probability is, that the eleven-league grant was abandoned when the petition was presented, and the grant obtained for other lands in a different part of the country. In no other way can we acquit Pico of a wilful departure from the law under which he acted, and account for the petition and grant of the 6th of May.

It is fair to infer from this record that Roland was an intelligent man, and knew the limit of the governor's power to grant lands, and the corrective applied by the Departmental Assembly when he exceeded his authority. If so, he knew Pico had no right to make the eleven-league grant, because he had already conceded to him the undivided half of four leagues, in July, 1845. It may be, before the proceedings were completed for the eleven-league grant, he saw his difficulty, and concluded to rely on the first grant made

to him, and to ask for a concession of other lands nearer the settled part of the State, and which lands, although less in quantity, were more desirable. Adopting this theory, the conduct of Roland in asking for other lands on the 6th of May, can be explained. On any other theory his petition on that day for an additional grant, and Pico's action conceding it, were palpable frauds committed against the letter and spirit of the colonization laws of Mexico.

Without pursuing the subject further, in our opinion this claim should not be confirmed.

The archive papers fail to make out the title, and the papers produced by the claimant are not genuine, but the result of an afterthought, and would never have been produced in court if the unparalleled growth of California had not stimulated the cupidity of speculators to experiment with fragments of title-papers left unfinished by Pico, and which were gathered up by our officers on the conquest of the country.

DECREE AFFIRMED.

MILLER and FIELD, JJ., dissenting.

APPENDIX.

(*See page* 109.)

THE remarks referred to by Mr. Justice Grier, in this page, as "clear and satisfactory," were contained in a review not generally accessible to the profession, of the unreported case of *McDermond* v. *Kennedy*, in the Supreme Court of Pennsylvania. The late Chief Justice GIBSON had spoken of that case as furnishing *an authority in point*, for a particular position; a statement which the Editors of the "Pennsylvania Law Journal" for December, 1846, considered was not warranted by the facts of the case. The case, it appeared, had come before the Supreme Court of Pennsylvania on an appeal, involving, in an abstract form, a question relating to the power of municipal corporations to tax in a particular instance. The court below denied the right. The case was argued in the Supreme Court, and there fully considered by the four judges present; but no opinion was delivered, and the judgment below was simply affirmed. There was no report or evidence of any other particulars in the case. The observations of Mr. H. B. Wallace are as follows:

"If the case, in fact, was deliberately considered by the judges in consultation, and in consequence of this consideration the judgment of the Court of Common Pleas was affirmed, it is a matter of inferior moment, and not in the least degree affecting the authority of the decision by the Supreme Court, that no written opinion was delivered, or that by misapprehension or otherwise the case was not assigned, after consultation, to any particular judge to prepare an opinion upon the subject. The absence of a written 'opinion' may render it difficult, or perhaps wholly impossible, to determine what principle the judgment of the Supreme Court did establish, but the judgment is an *authority* for some principle, whatever it may be.

"There is some doubt as to a part of the history of this case. We do not know all that was done in the Supreme Court. But materials enough exist to enable us to determine, beyond doubt, that there was here a judgment of the Supreme Court on a point of law.

"We know that a judgment of the Common Pleas denying the right of the borough to assess a certain tax was brought into the Supreme Court, by writ of error, in order to try the right. We know that there was an argu-

ment by counsel before the court, and a consultation upon the case by the court. And we know that, during the term, the judgment of the Common Pleas was affirmed. Four judges, only, sat; and what were their individual opinions we do not know. There could not have been a majority in favor of the right, or else the judgment of the Common Pleas would not have been affirmed. Either the judges were unanimous, or a majority of them were against the right; or they were equally divided in opinion, and the judgment of the Common Pleas was affirmed from necessity. How this was, no evidence exists to show. Take it at the worst that is possible, and what is the nature and effect in law of a judgment affirmed from necessity in a court of error, on an equal division of the court? The history of the late case of *The Queen* v. *Millis*, will afford an illustration on this subject.

"This case, reported in 10th Clark & Finnelly's Appeal Cases, 534, involved the question, whether a contract of marriage *per verba de præsenti*, but not made in the presence of a minister, in Episcopal orders, constituted a full and complete marriage at common law? On an indictment for bigamy, which depended on this question, the Court of Queen's Bench in Ireland, four judges sitting, were equally divided; but afterwards, and for the purpose of obtaining the judgment of the House of Lords, one judge, who had been in favor of the validity of the marriage, in form withdrew his judgment, and thereupon a judgment of acquittal was entered, and the case was brought by *certiorari* to the House of Lords. In the House of Lords, Lords Abinger and Cottenham and the Lord Chancellor were of opinion that it was not a perfect marriage, and were for affirming the judgment; Lord Brougham, Denman, and Campbell were of the opposite opinion. The entry on the journals of the Lords is: 'It was ordered and adjudged by the Lords that the judgment given in the said Court of Queen's Bench be, and the same is hereby affirmed; and that the record be remitted,' &c. And the fuller entry on the minutes states, that Lords Cottenham and Campbell having been appointed to tell the number of votes, it appeared, on report thereof, that the votes were equal, that is, two for reversing, and two for affirming, 'whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, it was determined in the negative. Thereupon the judgment of the court below was affirmed, and the record remitted.'

"While this case was pending in the Lords, the case of *Catherwood* v. *Caslon*, involving the same general question, came on in the English Court of Exchequer,* and, after argument, judgment was suspended until the decision of that case. 'The case of *Regina* v. *Millis*,' says the reporter of the case in the Exchequer, 'having been determined, and the invalidity of a marriage at the common law, contracted *per verba de præsenti*, but not in the presence of a priest in holy orders, having been thereby established, the present case came on again for argument.' The counsel sustaining the side of the marriage admitted that, 'according to the decision of the House of Lords, it must be taken that no valid marriage had been contracted;' and Parke, B., in pronouncing the judgment of the court said: 'The parties in this case entered into a contract of marriage *per verba de præsenti*, in the presence of witnesses, but not proved to have been made in the presence of a

* 13 Meeson & Welsby, 261.

minister in Episcopal orders. Since the original argument, it has been decided in the House of Lords, in the case of *The Queen* v. *Millis*, that unless in the presence of such a minister, such a contract does not constitute a valid marriage at common law in this country; *and by the authority of that case we are bound.*'

"Undoubtedly, the affirmance of the judgment in *The Queen* v. *Millis*, was against what had been the general impression of the profession after the case of *Dalrymple* v. *Dalrymple*, yet no one in the Exchequer suggested that the affirmance in the House of Lords by an equally divided court had not settled the law by conclusive authority. An equal division of a court of error, on a question of reversing a judgment, is like a tie vote in a legislative assembly on a question of enacting or repealing a law. The binding nature of the decision is the same, as where the action of the body is unanimous. The influence of an opinion, on the minds of professional persons, will depend on the character of the judge who delivers it, and on the number of judges who unite in it; but the authority of a judgment of a supreme tribunal, as establishing a principle and settling the law, is the same, whether the court be full and unanimous, or partial and divided. A judgment affirmed by a divided court binds inferior courts, and of course is a precedent in the court in which it was entered. And not only is the judgment of a court, in itself, an authority, but it is the only thing that is an authority.

"It follows that Chief Justice GIBSON was strictly accurate in saying of *McDermond* v. *Kennedy*, that 'had the case been reported, it would have furnished AN AUTHORITY IN POINT.'"

INDEX.

ADMIRALTY. See *Collision; Information*, 2; *Jurisdiction*, 20, 21; *Practice*, 12, 15.

1. Vessels are liable in admiralty for marine torts committed by them through the negligence of a pilot in charge, and compulsorily taken on board. *The China*, 53.
2. By its law, all maritime claims upon the vessel extend to the proceeds arising from its sale. *The Siren*, 152.
3. Where, in case of collision, with loss, there is reasonable doubt as to which party is to blame, the loss must be sustained by the one on which it has fallen. *The Grace Girdler*, 196.
4. The rule of navigation which requires that a vessel coming up behind another, and on the same course with her, shall keep out of the way, presupposes that the other vessel keeps her course, and it is not to be applied irrespective of the circumstances which may render a departure from it necessary to avoid immediate danger. *Ib.*

AGENT.

1. Where an instrument payable at a bank is lodged with the bank for collection, the bank becomes the agent of the payee to receive payment. *Ward* v. *Smith*, 447.
2. Where not lodged with the bank, whatever the bank receives from the maker to apply upon the instrument, it receives as his agent. *Ib.*
3. Without special authority, an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent. *Ib.*

ALABAMA.

Her statute of 7th October, 1864, under which contracts of affreightment are authorized to be enforced *in rem* through the courts of the State, by proceedings, the same in form as those used in courts of admiralty of the United States, is unconstitutional. *The Belfast*, 624.

ARBITRAMENT AND AWARD.

An act of Congress referring a claim against the government to an officer of one of the executive departments, to examine and adjust, does not, even though the claimant and government act under the statute, and the account is examined and adjusted, make the case one of "arbitrament and award." *Gordon* v. *United States*, 188.

ASSIGNMENT. See *Equity*, 8.

ATTORNEY-AT-LAW. See *Judicial Officers*, *Mandamus*, 1.

1. Cannot be disbarred for misbehavior in his office of an attorney generally, upon the return of a rule issued against him for contempt of court, and without opportunity of defence to the first-named charge. *Ex parte Bradley*, 364.
2. However, formal allegations, making specific charges of malpractice, are not essential as a foundation for proceedings against attorneys. What is requisite is, that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or injustice, is a matter of judicial regulation. *Randall* v. *Brigham*, 523.

ATTORNEY-GENERAL. See *Informer*.

AUTHORITY.

1. Where the judges of the Supreme Court of the United States are equally divided in opinion, the judgment of affirmance, which is the judgment rendered in such a case, is as conclusive as if rendered upon the concurrence of all the judges. *Durant* v. *Essex Company*, 107; and see *Appendix*, 753.
2. The law about municipal bonds, as adjudged in *Gelpcke* v. *The City of Dubuque* (1 Wallace, 176–228), is not open for re-examination. *Lee County* v. *Rogers*, 181.

BANK BILLS. See *Tender*.

BILL OF EXCEPTION. See *Practice*, 1, 2, 10.

Should only present the rulings of the court upon some matter of law, and contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issue involved. *Lincoln* v. *Claflin*, 132.

BILL QUIA TIMET. See *Equity*, 1.

BILLS OF EXCHANGE. See *Texas*, 2.

The matter of, when drawn by officers of the government, examined; and the law decided to be, that as under existing laws there can be no lawful occasion for an officer to accept drafts on behalf of the government, such acceptances cannot bind it, though there may be occasions for drawing or paying drafts which may bind the government. *The Floyd Acceptances*, 666.

BLOCKADE. See *Public Law*, 2.

CALIFORNIA.

A grant of land in, purporting to have been made by Governor Pio Pico, on the 2d of May, 1846, and insufficient on the archive papers, decided not to be helped by papers produced by the claimant; these being found by the court, upon the evidence in the case, not genuine, but fabricated on an afterthought, from fragments of papers left unfinished by Pio Pico. *Roland* v. *United States*, 743.

CANCELLATION OF PATENT. See *Practice*, 18.

CAUSA PROXIMA VEL REMOTA. See *Inspection*, 3; *Insurance*, 1.

CHARTER-PARTY.

1. The stipulation of, to take a cargo of lawful merchandise, implies that the articles composing the cargo shall be in such condition, and be put up in such form, that they can be stowed and carried without one part damaging the other. *Boyd* v. *Moses*, 316.
2. The master of a ship may, therefore, refuse to take goods offered for shipment, if in his honest judgment they are in such condition or of such character, that they cannot be carried without injury to the rest of the cargo, without violating a charter-party containing the condition mentioned. *Ib.*
3. A letter from the charterer to the master, making agreement to hold the ship harmless for a shipment of goods of such a character, held to be a modification of the terms of the charter-party, and valid between charterer and owner. *Ib.*

CITIZENSHIP. See *Naturalization.*

COLLECTORS.

Prior to the act of June 12th, 1858, providing compensation not exceeding one quarter of *one per cent.* to them, acting as disbursing agents of the United States in certain cases, they could not, if receiving a general maximum compensation, under the act of March 2d, 1831 (§ 4), and also a special maximum of $400, under the act of May 7th, 1822 (§ 18), recover for disbursements made for building a custom-house and marine hospital at the port where they were collectors. *United States* v. *Shoemaker*, 388.

COLLISION.

1. The meaning of the terms, "meeting end on," and "meeting nearly end on," as used within the 11th Article of the Act of Congress of April 29, 1864, fixing "Rules and Regulations for Preventing Collisions on Water," considered. And, two sailing vessels pursuing, in the night time, lines which, if followed, it was probable, would bring them into collision, considered, when but two or three miles apart, as "meeting end on, or nearly end on, so as to involve risk of collision" within the meaning of the article above referred to; their rate of speed having been, at the time, six miles an hour each, and their rate of approximation, therefore, a mile in each five minutes. *The Nichols*, 656.
2. Vessels are liable for tortious collisions, committed by them at sea, through the negligence of a licensed pilot, compulsorily taken by them on board. *The China*, 53.

COLUMBIA. See *District of.*

COMPULSION. See *Duress.*

Under a State pilot law, which enacted that all vessels "*shall* take a licensed pilot, or, in case of refusal to take such pilot, *shall* pay pi-

COMPULSION (*continued*).

lotage as if one had been employed," and that any person not licensed as a pilot, who should attempt to pilot a vessel as aforesaid, should be "deemed guilty of a misdemeanor, and, on conviction, be punished by a fine not exceeding $100, or imprisonment not exceeding sixty days," and that all persons employing any one to act as a pilot not holding a license, should "forfeit and pay the sum of $100:" *Held*, that vessels were compelled to take a pilot. *The China*, 53.

CONDITION. See *Insurance*, 2, 3.

1. A grant of land, "*upon the express understanding and condition*" that a certain institute of learning then incorporated "shall be *permanently located* upon said lands," between the date of the deed and the same day in the succeeding year, is a grant upon condition. *Mead* v. *Ballard*, 290.
2. The condition is fulfilled when the trustees pass a resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the corporation. And this, notwithstanding that the building erected in pursuance of the resolution was afterwards destroyed by fire, and the institute subsequently erected on another piece of land. *Ib.*

CONFLICT OF JURISDICTION.

I. Between Federal Courts and State Courts.

1. The statutes of a State limiting the jurisdiction of suits against counties to Circuit Courts held within such counties can have no application to courts of the National government. *Cowles* v. *Mercer County*, 118; *Payne* v. *Hook*, 425.

II. Between Congress and State Legislatures.

2. Certificates of indebtedness issued by the United States to creditors of the government, for supplies furnished to it in carrying on the war to suppress the late rebellion, and by which the government promised to pay the sums of money specified in them, with interest, at a time named, are beyond the taxing power of the States. *The Banks* v. *The Mayor*, 16.
3. So are notes issued by the United States under the Loan and Currency Acts of 1862 and 1863, intended to circulate as money, and actually making, with the National bank notes, the ordinary circulating medium of the country. *Bank* v. *Supervisors*, 26.
4. State legislatures have no authority to create maritime liens; nor can they confer jurisdiction upon a State court, to enforce such a lien by a suit or proceeding *in rem*, as practised in admiralty courts. *The Belfast*, 624.
5. The equity jurisdiction and remedies conferred by the Constitution and statutes of the United States cannot be limited or restrained by State legislation, and are uniform throughout the different States of the Union. *Payne* v. *Hook*, 425.

CONFLICT OF JURISDICTION (*continued*).

III. BETWEEN STATE LEGISLATURES.

6. A State has no power to tax the interest of bonds (secured in this case by mortgage) given by a railroad corporation, and binding every part of the road, when the road lies partially in another State;—one road incorporated by the two States. *Railroad Company* v. *Jackson*, 262.

CONSTITUTIONAL LAW. See *Attorney at Law*, 1; *Conflict of Jurisdiction*; *Internal Revenue*, 3; *Ships and Shipping*, 3.

1. The "full faith and credit" required by the Federal Constitution to be given in each State to the judicial proceedings of every other State, is not given in one State to the judicial proceedings of another, when these last (proceedings *in rem*) do not operate to bar a further suit in the second State as fully as they would do in the first. *Green* v. *Van Buskirk*, 139.
2. The nature of "a State," within the various meanings of the Constitution considered; and the meaning of the word as applied to one of the United States, settled. *Texas* v. *White*, 700.
3. The 5th and 6th Amendments to the Constitution of the United States (relating to criminal prosecutions), were designed exclusively as restrictions upon Federal power. *Twitchell* v. *The Commonwealth*, 321.
4. A statute of a State releasing "whatever interest" in certain real estate may "rightfully" belong to it, is not a law impairing the obligation of a contract in a case where an agent of the State, having by contract with it acquired an interest in *half* the lot, undertakes to sell and conveys the *whole* of it. *Mulligan* v. *Corbins*, 487.
5. The repeal, pending an appeal provided for by it, of an act of Congress enacting that the Supreme Court shall have appellate jurisdiction over final decisions of the Circuit Courts, in certain cases, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal. It negatives the jurisdiction. *Ex parte McCardle*, 506.

CONTRACT. See *Constitutional Law*, 4; *Inspection*, 2, 3; *Insurance*, 2; *Public Policy*.

1. A government contract, not very clear in its terms, interpreted against the interests of the government, it having been suggested by one officer of the government, signed by another officer in behalf of the government, without its being signed by the contractor on the other side, and the interpretation which this court thus, and upon what it deemed a reasonable construction of the language of the amendment, gave to the amendment, having been that which the officer who suggested it had acted upon as the right one. *Garrison* v. *United States*, 688.
2. The designation of a bank as the place of payment of a bond, imports a stipulation that its holder will have it at the bank when due to receive payment, and that the obligor will produce there the funds to pay it. *Ward* v. *Smith*, 447.
3. If the obligor is at the bank, at the maturity of the bond, with the

CONTRACT (*continued*).

necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. *Ib.*

4. A stranger with whom the sureties of a contractor in a government contract, which provided that it should *not be sublet*, agree that *he* shall perform the contract (the contractor having abandoned it, and his sureties having taken it up), and whom the sureties constitute *their attorney*, to perform the work, on paying them a percentage of the money received from the government, *held* not to fall within the terms of an act of Congress making a proposition to all persons "interested on account of their *contract*" (describing the purport of the original contract). *Kellogg* v. *United States*, 361.

CORPORATION. See *Authority*, 2; *Equity*, 2.

1. Neither the identity of a municipal corporation, nor its right to hold property devised to it, is destroyed by a change of its name, an enlargement of its area, or an increase in the number of its corporators; changes which the legislature has power to make. *Girard* v. *Philadelphia*, 1.
2. Under the laws of Iowa, a railroad company, having power to issue its own bonds in order to make its road, may guaranty the bonds of cities and counties which have been lawfully issued, and are used as the means of accomplishing the same end. *Railroad Company* v. *Howard*, 392.

COURT OF CLAIMS. See *Estoppel.*

Has no jurisdiction of cases arising under the Revenue Laws. *Nichols* v. *United States*, 122.

CUSTOMS OF THE UNITED STATES. See *Internal Revenue.*

Under the act of Congress of February 26, 1845, relative to the recovery of duties paid under protest, a written protest, signed by the party, with a statement of the definite grounds of objection to the duties demanded and paid, is a condition precedent to a right to sue for their recovery. *Nichols* v. *United States*, 122.

DISTRICT OF COLUMBIA.

The Supreme Court of the, as organized by the act of March 3, 1863, is a different court from the Criminal Court as fixed by the same act, though the latter court is held by a judge of the former. *Ex parte Bradley*, 364.

DOMICILE. See *Fiction of Law.*

DURESS. See *Compulsion.*

A deed procured through fear of loss of life, produced by threats of the grantee, may be avoided for. *Brown* v. *Pierce*, 205.

ENTRY. See *Land Office.*

EQUITY. See *Land Office; Lien; Pleading*, 4, 5; *Practice*, 18.

1. Where a testator devises the income of property in trust primarily for one object, and if the income is greater than that object needs, the surplus to secondary ones, a bill in the nature of a bill *quia timet*, and in anticipation of an incapacity in the trusts to be executed hereafter, and when a surplus arises (there being no surplus now, nor the prospect of any), will not lie by heirs-at-law, to have this surplus appropriated to them on the ground of the secondary trusts having, subsequently to the testator's death, become incapable of execution. *Girard* v. *Philadelphia*, 1.
2. Where a devise is made to a municipal corporation, upon trusts confessedly valid, the right to inquire into, or contest the power of the corporation to execute the trusts, belongs to the State alone as *parens patriæ*, not to the heirs of the testator. *Ib.*
3. Where the legislature creates a city, carving it out of a region previously a town only, and enacts that all bonds which had been previously issued by the town should be paid when the same fell due, by the *city and town*, in the same proportions as if said town and city were not dissolved, and that if either at any time pays more than its proportion, the other shall be liable therefor, a bill will lie to enforce payment by the two bodies respectively, in the proportion which the assessment rolls show that the property in one bears to the property in the other. *Morgan* v. *Beloit, City and Town*, 618.
4. A bill by the owner of real estate, sold at public judicial sale, will lie (over and above efforts for summary relief) against a person who, at such sale, has made untrue representations, which prevent other persons from bidding, and by which he has, himself, got the property at an undervalue. *Cocks* v. *Izard*, 559.
5. A sale of a valuable railroad and its franchises, set aside; the facts being held evidence of collusion between particular creditors and the directors, to the injury of creditors generally. *Drury* v. *Cross*, 299.
6. Same thing done on facts which were held to be evidence of arrangement between particular creditors and stockholders, to the injury of creditors generally. *Railroad Company* v. *Howard*, 392.
7. The fact that a creditor has a remedy at law against a principal, does not prevent him, after the issue in vain of execution against such principal, from proceeding in equity against a guarantor. *Ib.*
8. A claim which has never received the assent of the person against whom it is asserted, and which remains to be settled, cannot be so assigned as to give the assignee an equitable right to prevent the original parties from compromising the claim on any terms that may suit them. *Kendall* v. *United States*, 113.
9. Stockholders in a corporation need not be individually made parties in a creditor's suit where their interest is fully represented both by the railroad company and by a committee chosen and appointed by them. *Railroad Company* v. *Howard*, 392.
10. On a bill, by one distributee of an intestate's estate against an administrator, it is not indispensable that the other distributees be made parties, if the court is able to proceed to a decree, either through a

EQUITY (*continued*).

reference to a master or some other proper way, so as to do justice to the parties who are before it, without injury to absent parties equally interested. *Payne* v. *Hook*, 425.

11. The sureties of an administrator on his official bond may properly be joined with him in an equity proceeding for an erroneous and fraudulent administration of the estate by him, and where, if a balance should be found against the administrator, those sureties would be liable. *Ib.*

ESTOPPEL. See *Res Judicata.*

If a claimant, under a contract made by an inferior officer of an executive department, and which the head of the department has refused to acknowledge, voluntarily come before a board appointed by Congress to decide upon the claim, and present his claim, and the board investigate it, and,—Congress afterwards enacting that all claims allowed by such board shall be deemed to be due and payable, and be paid upon presentation of a voucher with the commissioners' certificate thereon—the petitioner do present his voucher and receive payment of the sum so allowed by the board, he cannot afterwards recover in the Court of Claims a balance which would remain on an assumption of the validity of his original contract. *United States* v. *Adams*, 463.

EVIDENCE. See *Pleading*, 5.

I. In Cases Generally.

1. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible. *Lincoln* v. *Claflin*, 132.
2. Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence. *Ib.*

II. In Patent Cases. See *Patent*, 6.

3. In bill for infringement, evidence of prior knowledge or use of the thing patented is not admissible, unless the answer contain the names and places of residence of the persons who are alleged to have possessed a prior knowledge of the thing, and a statement of the place where the same had been used. *Agawam Company* v. *Jordan*, 583.

III. In Cases against Public Officers.

4. Before a depositary of public money can, in a suit against him by the United States for a balance, offer proof of credits for clerk hire, he must show by evidence from the books of the treasury that a claim for such credits had been presented to the proper officers of the treasury, and by them had been, in whole or in part, disallowed. *United States* v. *Gilmore et al.*, 491.
5. If proof of such credits have been permitted to go to the jury without such proper foundation for it having been first laid, it must be after-

EVIDENCE (*continued*).
wards absolutely excluded, and all consideration of the claims withdrawn from them. *Ib.*
6. Whether testimony in support of such claims was properly in the case, was a question for the court. *Ib.*

EXECUTIVE OFFICERS OF THE UNITED STATES. See *Bills of Exchange.*

EXPRESSIO UNIUS, &c.
The maxim held not to apply to two statutes, one specific and one general; but both providing for laying taxes to pay debts. *Morgan* v. *Town Clerk*, 610.

FICTION OF LAW.
The one that the domicile of the owner draws to it his personal estate wherever it may happen to be, yields whenever, for the purposes of justice, the actual *situs* of the property should be examined. *Green* v. *Van Buskirk*, 139.

FORFEITURE. See *Landlord and Tenant; Secretary of the Treasury.*

GOVERNMENT OFFICERS. See *Bills of Exchange; Heads of Departments.*

GUARANTY. See *Corporation*, 2.

HABEAS CORPUS.
The appellate jurisdiction in cases of, which was exercised by this court prior to the act of February 5, 1867, remains, notwithstanding the act of 27th March, 1868, repealing the jurisdiction in certain other cases. *Ex parte McArdle*, 506.

HEADS OF DEPARTMENTS.
If there exist well-grounded suspicions, tending strongly to the conclusion that contracts have been entered into, and debts incurred, within a particular military district, in disregard of the rights of the government, the Secretary of War is bound to interpose, has a right and is bound to issue an order to suspend the payment of all claims against it. *United States* v. *Adams*, 463.

ILLINOIS.
By the laws of, an attachment on personal property there will take precedence of an unrecorded mortgage executed in another State where record is not necessary, though the owner of the chattels, the attaching creditor, and the mortgage creditor, are all residents of such other State. *Green* v. *Van Buskirk*, 139.

INFORMATION.
1. One under the acts of August 6th, 1861, and July 17th, 1862, which presents only a case of the unlawful conversion of property to the use of the persons proceeded against, cannot be sustained. *Morris and Johnson* v. *United States*, 578.

INFORMATION (*continued*).

2. Neither the act of 1861, nor the act of 1862, contemplates any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture. *Ib.*

INFORMER.

1. Has no vested interest in the subject-matter of the suits, in prosecutions under the act of August 6th, 1861, which subjects to confiscation, upon libel filed, property whose owner used or consented to its use in aiding the rebellion, and this, notwithstanding that the act declares that where any person files an information with the Attorney of the United States (as the act allows any person to do), the proceedings shall be "for the use of such informer and the United States in equal parts." *Confiscation Cases*, 454.
2. Hence, the Attorney-General may properly, and against the interest and objection of the informer, consent to and so cause a dismissal of an appeal, or a reversal of a decree, by which dismissal or reversal he conceives that justice is done. *Ib.*

INSPECTION.

1. At the place of shipping instead of at the place of delivery, by the officers of the United States, of supplies which a contractor has agreed to deliver at a distant point, does not pass the property to the United States so as to relieve the contractor from his obligation to deliver at such point. *Grant* v. *United States*, 331.
2. Where a contract with the government to furnish to it supplies does not stipulate for an inspection at a place earlier than the place of delivery, it is optional with the contractor whether he will have the goods inspected at such earlier place. *Ib.*
3. Where a delay by the government in making an inspection of supplies, agreed to be made at the place of shipping instead of at the place of delivery, is not the proximate cause of a loss of the supplies afterwards suffered, the loss must be borne by the party in whom the title to the supplies is vested; and, if still in the contractor, by him. This rule applies even where supplies have been seized by the public enemy without any default of the owner. *Ib.*

INSURANCE. See *Internal Revenue*, 3.

1. Where an explosion took place in one building, setting it on fire; from which building the fire went to another building across a street; and from the second to a third, across another street, and burnt it. Held, the whole fire having been a continuous affair, and under full headway in about half an hour, that the explosion was the cause of the fire last occurring; and the last building being insured by a policy which contained an exception for loss by fire happening "by means of any explosion," that the insurers were not liable; the case not being one for the application of the maxim, "*Causa proxima, non remota spectatur.*" *Insurance Company* v. *Tweed*, 44.
2. A condition in a policy of fire insurance that no action for recovery

INSURANCE (*continued*).

shall be sustained, unless commenced within twelve months after the loss, and that the lapse of this period shall be conclusive evidence against the validity of any claim, if an action for its enforcement be subsequently commenced, is not against the policy of the statute of limitations, and is valid. *Riddlesbarger* v. *Hartford Insurance Company*, 386.

3. The action mentioned in the condition which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case; although such previous action was commenced within the period prescribed. *Ib.*

INTEREST. See *Usury*.

1. Is due on coupons, after payment of them is unjustly neglected or refused. *Aurora City* v. *West*, 82.
2. Is not allowable as a matter of law, in cases of tort. Its allowance as damages rests in the discretion of the jury. *Lincoln* v. *Claflin*, 132.
3. Is, apparently, not sanctioned by the Supreme Court on claims against the government. *Gordon* v. *United States*, 188.
4. If the rule that it is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of States in rebellion and citizens of States adhering to the National government in the late civil war, it can only apply when the money is to be paid to the belligerent directly; it cannot apply when there is a known agent appointed to receive the money, resident within the same jurisdiction with the debtor. In this latter case the debt will draw interest. *Ward* v. *Smith*, 447.

INTERNAL REVENUE. See *Secretary of the Treasury*.

1. The Internal Revenue Act of June 30th, 1864, does not lay a tax on the income of a non-resident alien, arising from bonds held by him of a railroad company incorporated by States of the Union, and situated in them. *Railroad Company* v. *Jackson*, 262.
2. When a person whose income or other moneys subject to tax or duty has been received *in coined money*, makes his return in that form to the assessor, the Internal Revenue Act of July 13th, 1866, is to be construed as requiring that the difference between coined money and legal tender currency shall be added to his return when made in coined money, and that he shall pay the tax or duty upon the amount thus increased. *Pacific Insurance Company* v. *Soule*, 434.
3. The income tax or duties laid by sections 105 and 120 of the act of June 30, 1864, and the amendment thereto of July 13, 1866, upon the amounts insured, renewed, or continued by insurance companies upon the gross amounts of premiums received, and assessments made by them, and also upon dividends, undistributed sums, and income, is not "a direct tax," but a duty or excise. *Ib.*

INTERPRETATION. See *Contract*, 1; *Statutes*, 1, 2.

IOWA. See *Corporation*, 2.

Under its laws, if in an action to recover land, the plaintiff averring that he claims and is entitled to the land, and the defendant denying such right of possession, but setting up no title in himself—there has been a reversal in this court, and a mandate "to enter judgment for the defendant below," the judgment should be that the plaintiff hath no title. *Litchfield* v. *Railroad Company*, 270.

JUDGMENT. See *Lien*.

JUDICIAL OFFICERS.

An action for damages does not lie against a judge of a court of general jurisdiction, for removing, whilst holding court, an attorney-at-law, from the bar, for malpractice in his office, the court being empowered by statute to remove attorneys for "any deceit, malpractice, or other gross misconduct;" and having heard the attorney removed, in explanation of his conduct in the transaction which was the subject of complaint. And such action will not lie against the judge, even if the court, in making the removal, exceeds its jurisdiction, unless, perhaps, in the case where the act is done maliciously or corruptly. *Randall* v. *Brigham*, 523.

JURISDICTION. See *Practice*, 8, 4.

I. Of the Supreme Court of the United States.

(*a*) It has jurisdiction—

1. Of a decree (as final) which on a bill relating to the ownership and transfer of stock decided the right to it, directed it to be delivered by the defendant to the complainant by transfer, and entitled the complainant to have the decree carried immediately into execution; leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership. *Thompson* v. *Dean*, 342.
2. Or, where ordering an injunction (previously granted to restrain a sale under a deed of trust) to be dissolved, *it directed a sale according to the deed of trust, and the bringing of the proceeds into court. Railroad Company* v. *Bradleys*, 575.
3. Of an appeal (as actually allowed), where the record shows that an appeal was prayed for in open court, and an appeal bond filed and approved by one of the judges. *Ib.*
4. An original bill (as "of controversies between a State and citizens of another State"), where there is a State government competent to represent the State in its relations with the National government, which Texas after the suppression of the rebellion, but before its full restoration to a normal position in the Union, is. *Texas* v. *White*, 700.
5. (Under the twenty-fifth section of the Judiciary Act), where an act of a State legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on Federal securities made by the Constitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion

JURISDICTION (*continued*).

of the securities for the tax on which the bank claimed reimbursement, was, in law, not exempt, and the highest court of the State sanctioned this refusal. *The Banks* v. *The Mayor*, 16.

6. In *Habeas Corpus* since the act of 27th March, 1868, to the same extent that it had prior to the act of February 5, 1867. *Ex parte McArdle*, 506.

(*b*) It has NOT jurisdiction—

7. By mere agreement of parties, and without an appeal or writ of error. *Washington County* v. *Durant*, 694.
8. Where a citation upon a writ of error to a State court has been signed only by a district judge. *Palmer* v. *Donner*, 541.
9. Where the transcript contained only a blank form of a certificate of authentication, without the seal of the court below, or certificate of authentication. *Blitz* v. *Brown*, 693.
10. Of a division of opinion between the judges of the Circuit Court, upon a *motion to quash an indictment*. *United States* v. *Rosenburgh*, 580.
11. Of the action of the court below on a motion for new trial. *Laber* v. *Cooper*, 565.
12. Or, as to the terms on which it will allow a complainant to amend a bill to which a demurrer has been sustained. *Sheets* v. *Selden*, 416.
13. Through an order of a Circuit Court directing the transfer of a cause to this court, though such transfer be authorized by the express provision of an act of Congress. *The Alicia*, 571.
14. Nor of an appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable. It is no longer a valid appeal or writ. *Edmonson* v. *Bloomshire*, 306.
15. And although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal. *Ib.*
16. Nor can such vitality be restored by an order of the Circuit Court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one. *Ib.*
17. Nor (under the twenty-fifth section of the Judiciary Act) if a State statute passed in professed exercise of an authority given by Congress to the States to pass such a statute, does not deprive, contrary to the act of Congress, *the party to the suit*, of any right, nor work, as to *him*, any effect which the act of Congress forbids, can this court, on the case being brought here by such party on the ground that the State statute violated the act of Congress, declare the State statute void. *Austin* v. *The Aldermen*, 694.

II. OF CIRCUIT COURTS OF THE UNITED STATES.

18. Such courts, for any district embracing a particular State, will have

JURISDICTION (*continued*).

jurisdiction of an equity proceeding against an administrator (if according to the received principles of equity a case for equitable relief is stated), notwithstanding that by a peculiar structure of the State probate system such a proceeding could not be maintained in any court of the State. *Payne* v. *Hook*, 425.

19. The act of February 28th, 1839 (§ 8, 5 Stat. at Large, 322), providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most convenient Circuit Court in the next adjacent State, is not repealed by the act of March 3d, 1863 (12 Stat. at Large, 768), providing that under certain circumstances named in *it*, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time. *Supervisors* v. *Rogers*, 175.

III. OF DISTRICT COURTS OF THE UNITED STATES.

20. Sitting as prize courts they may hear and determine all questions respecting claims arising *after* the capture of a vessel. *The Siren*, 152.
21. They have exclusive original cognizance of a proceeding *in rem* to enforce a maritime lien, albeit the lien arise from the ordinary contract of affreightment for transportation between ports and places within the same State, and all the parties be citizens of the same State, provided only that such contract be for transportation upon navigable waters to which the general jurisdiction of the admiralty extends. *The Belfast*, 624.

LANDLORD AND TENANT.

1. Where, in a lease, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of the property leased (a water-power), the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for non-payment of rent reserved, set up a counter claim for repairs made necessary by the landlord's gross negligence. *Sheets* v. *Selden*, 416.
2. In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rent due, and the amount which he could rightly claim by way of reduction for the failure alleged. *Ib.*

LAND OFFICE. See *Public Lands.*

The act of the Secretary of the Interior and Commissioner of the Land Office, in cancelling an entry for land, is not a ministerial duty, but is a matter resting in the judgment and discretion of these officers as representing the Executive Department. Accordingly, this court will not interfere by injunction more than by mandamus to control it. *Gaines* v. *Thompson*, 347.

LEGAL TENDER. See *Tender.*

LEGISLATIVE POWER. See *Corporations*, 1; *Constitutional Law*, 5.

LIEN. See *Jurisdiction*, 20.

A judgment being but a general one, and the creditor under it obtaining no incumbrance but on such estate as his debtor really had, the equity of such creditor gives way before the superior right of an owner in the land who had conveyed the land to the debtor only by duress, and who had never parted with possession. *Brown* v. *Pierce*, 205.

LIS PENDENS.

The doctrine of, has no application to a case where there were three distinct and independent suits, with an interval of one year between the first and second, and of two years between the second and third. *Lee County* v. *Rogers*, 181.

LOUISIANA.

1. A decree of the Provisional Court of, which was established by order of the President, during the rebellion, having been transferred into the Circuit Court, in pursuance of an act of Congress, must be regarded, in respect to appeal, as a decree of the Circuit Court. *The Grapeshot*, 563.
2. The act of March 3d, 1865 (13 Statutes at Large, 501), which provides a mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed in the Supreme Court of the United States, and also what may be reviewed in such cases, binds the Federal courts sitting in Louisiana as elsewhere, and the Supreme Court cannot disregard it. *Insurance Company* v. *Tweed*, 44.
3. However, in a case where the counsel for both parties in the Supreme Court had agreed to certain parts of the opinion of the court below as containing the material facts of the case, and to treat them on review as facts found by that court, the Supreme Court acted upon the agreement as if it had been made in the court below. *Ib.*

MAIL, THE UNITED STATES.

The temporary detention of, caused by the arrest of its carrier upon a bench warrant, issued by a State court, of competent jurisdiction, upon an indictment found therein for murder, is not an obstruction or retarding of the passage of the mail, or of its carrier, within the meaning of the ninth section of the act of Congress of March 3, 1825, which provides "that, if any person shall knowingly and wilfully obstruct or retard the passage of the mail," &c. *United States* v. *Kirby*, 482.

MANDAMUS.

1. Lies from the Supreme Court of the United States to an inferior court to restore an attorney-at-law disbarred by the latter court when it had no jurisdiction in the matter, as (*ex. gr.*) for a contempt committed by him before another court. *Ex parte Bradley*, 364.
2. The return to one, must be as broad as the requirement of the writ, and not broader; and it must disclose facts so fully as will enable the court to judge whether, supposing them true, they are a sufficient answer to the relator's case. *Benbow* v. *Iowa City*, 313.

"MEANDER LINES."

Their nature and effect stated. *Railroad Company* v. *Schurmeir*, 272.

MINNESOTA.

If, by the laws of, in 1859, the recording of a town or city plot, indicating a dedication for a public purpose of certain parts of the land laid out, operated as a conveyance in fee to the town or city, yet it could operate only as a conveyance of the fee, subject to the purpose indicated by the dedication, and subject to that it must be held by any future claimant. *Railroad* v. *Schurmeir*, 272.

MORTGAGE. See *Ships.*

MUNICIPAL BONDS. See *Authority*, 2; *Equity*, 3, 7; *Expressio Unius*, *Wisconsin.*

Of a county, where validity was questioned, *held* to be ratified by a statute which, creating a city out of part of the county, enacted that bonds, originally given by the county, should be paid by city and county in certain proportions. *Beloit* v. *Morgan*, 619.

MUNICIPAL CORPORATION. See *Authority; Corporation*, 1, 2; *Equity*, 1, 2, 7; *Municipal Bonds.*

NATURALIZATION.

The act of Congress of February 10th, 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen," means that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, she becomes by that fact a citizen also. *Kelly* v. *Owen et al.*, 496.

NEGOTIABILITY. See *Bills of Exchange; Texas.*

Contracts are not necessarily negotiable because by their terms they enure to the benefit of the bearer. *Railroad Company* v. *Howard*, 392.

PATENT. See *Evidence*, 3; *Pleading*, 6, 7; *Practice*, 18, 19.

1. *Semble* that an improvement in the plan of constructing a jail is not a subject of patent within the Patent Acts of 1836 or 1842. *Jacobs* v. *Baker*, 295.
2. He is the first inventor, and entitled to a patent, who, being an original discoverer, has first *perfected and adapted* the invention to actual use. *Whitely* v. *Swayne*, 685; *Agawam Company* v. *Jordan*, 583.
3. Thus, where a patent has been granted for improvements, which, after a full and fair trial, resulted in unsuccessful experiments, and have been finally abandoned, if any other person takes up the subject of the improvements, and is successful, he is entitled to the merit of them as an original inventor. *Whitely* v. *Swayne*, 685.
4. Where a master workman, employing other people in his service, has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestions from a person employed by him, not amounting to a new method or arrangement which in itself is a complete in-

PATENT (*continued*).

vention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. *Agawam Company* v. *Jordan*, 583.

5. Forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by practical experiment, affords no ground for presumption of abandonment. *Ib.*
6. Letters patent of long standing will not be declared invalid upon testimony largely impeached; as *ex. gr.*, where forty persons swear that the character of the witness for truth and veracity is bad; although very numerous witnesses, on the other hand, swear that they never heard his reputation in that way questioned. *Ib.*
7. Where a patent is extended by virtue of a special act of Congress, it is not necessary to recite in the certificate of extension all the provisos contained in the act. *Ib.*
8. When a patent is claimed for a discovery of a new substance by means of chemical combinations of known materials, it should state the component parts of the new manufacture claimed, with clearness and precision, and not leave the person attempting to use the discovery to find it out by "experiment." *Tyler* v. *Boston*, 827.
9. The term "*equivalent*," when used with regard to the chemical action of such fluids as can be discovered but by experiment, only means *equally good*. *Ib.*
10. Whether one compound of given proportions is substantially the same as another compound varying the proportions, is a question of fact, and for the jury. *Ib.*
11. Under the fourteenth section of the Patent Act of 1836, enacting that damages may be recovered by action on the case, to be brought in the name of the person "interested," the original owner of the patent, who has afterwards sold his right, may recover for an infringement committed during the time that he was owner. *Moore* v. *Marsh*, 515.

PHILADELPHIA.

Its rights under Girard's will. *Girard* v. *Philadelphia*, 1.

PILOT. See *Collision*, 2; *Compulsion.*

PLEADING. See *Lis Pendens; Public Policy*, 2; *Res Judicata.*

I. At Law.

1. In a case having long and complicated pleadings, where a second count of a declaration has been left by the withdrawal of a plea without an answer, so that judgment might have been had on it by *nil dicit*, a superior court will not, on error, infer, as of necessity, that a judgment below for the plaintiff was thus given; the case being one where, after such withdrawal, there were numerous demurrers, pleas, replications, and rejoinder, arising from a first count, and the proceedings showing that these were the subject of controversy. The second count will be taken to be waived. *Aurora City* v. *West*, 82.
2. A reversal in a court of last resort, *remanding a case*, cannot be set up as a bar to a judgment in an inferior court on the same case. *Ib.*

PLEADING (*continued*).

3. The rule that judgment will be given against the party who commits the first fault in pleading, does not apply to faults of mere form. *Ib.*

II. In Equity.

4. A decree dismissing a bill, which is absolute in its terms, unless made upon some ground which does not go to the merits, is a bar to any further litigation of the same subject between the same parties. *Durant* v. *Essex Company*, 107.

5. Where, in a bill, alleging a good title to lands in him, and setting forth, particularly, the nature of it, a complainant sought to have a conveyance made by duress annulled, and the land reconveyed free from the lien of judgments obtained against the grantee after the conveyance, and by way of affecting the judgment creditor with notice, set forth that he, the complainant, was never out of possession of the land, an answer, averring in general terms, that the respondent was informed and believed that the complainant entered as tenant of the grantee, but not specifying any time or circumstances of such entry, nor assigning any reason for not specifying them, is insufficient and evasive; there being nothing alleged which tended to show that the grantee ever pretended to have any other title than that derived from the complainant, or that there was any title elsewhere. *Brown* v. *Pierce*, 205.

III. In Patent Cases.

6. On a bill for an infringement of a patent, a defence "that the patentee fraudulently and surreptitiously obtained the patent for that which he knew was invented by another," is not a sufficient defence, unless accompanied by the further allegation, that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention. *Agawam Company* v. *Jordan*, 583.

7. So, to such a bill, the allegation in answer, of sale and public use "prior to the filing of an application for a patent," with the consent and allowance of the inventor, is insufficient, unless it is also alleged in the answer that such sale or use was more than two years before he applied for a patent. *Ib.*

PRACTICE. See *Bill of Exceptions; Constitutional Law*, 1, 8, 5; *Iowa; Jurisdiction; Pleading; Louisiana; Mandamus.*

I. In the Supreme Court.

(a) *As to writs of error to State courts.* See *Twitchell* v. *The Commonwealth*, 321.

(b) *Of affirmance, dismissal, and reversal.*

1. This court will, generally speaking, affirm (not dismiss), where there is no bill of exceptions, and nothing upon which error can be assigned. *James* v. *Bank*, 692.

2. As it did where the record shows only a judgment rendered in favor of a plaintiff for the recovery of a sum of money, where there was no question raised in the pleadings, no bill of exceptions, and no instructions or ruling of the court, and where what purported to be a state-

PRACTICE (*continued*).

ment of facts, signed by the judge, was filed more than two months after the writ of error was allowed and filed, and nearly a month after the citation was issued. *Generes* v. *Bonnemer*, 564.

3. It will DISMISS, though neither party ask it, if it is apparent that the court has not acquired jurisdiction for want of proper appeal or writ of error. *Edmonson* v. *Bloomshire*, 306.
4. However, where, acting under a statute decided by this court to be unconstitutional, a Circuit Court had transferred a cause to this court, a notice to docket and dismiss, which, if the case had been here constitutionally, would have been granted, was denied, and this court certified its opinion to the Circuit Court, for information, in order that it might proceed with the trial of the cause. *The Alicia*, 571.
5. It will not feel obliged to consider testimony objected to and received, if the record does not show that the objection was overruled and exception taken. *Labor* v. *Cooper*, 565.
6. It will NOT REVERSE because instructions asked for, even if correct in point of law, were refused, provided those given covered the entire case, and submited it properly to the jury. *Ib.*
7. Nor because no replication was put in to two of three special pleas, raising distinct defences, the case having been tried below as if the pleadings had been perfect and in form. *Ib.*
8. Nor because such pleas have concluded to the court instead of to the country; the matter not having been brought in any way to the attention of the court below. *Ib.*
9. Nor, under similar omission, because the language of the verdict in such a case is, that we find the "issue," &c., instead of the "issues." *Ib.*
10. Nor, on a general exception, to a charge embracing several distinct propositions, if any one of the propositions is correct. *Lincoln* v. *Claflin*, 132.
11. Nor where a defence which would have been a proper one in the court below (as that of usury on a promissory note), is attempted to be made for the first time in the Supreme Court; a matter which cannot successfully be done. *Ewing* v. *Howard*, 499.
12. Nor in admiralty cases, depending on a mere difference of opinion as to the weight and effect of conflicting testimony, where both the District and Circuit Courts have agreed. *The Grace Girdler*, 196.

(c) *As to supersedeas.*

13. A writ of error will not operate as a supersedeas unless a copy of the writ be lodged for the adverse party, within ten days, Sundays exclusive, after judgment or decree. *Railroad Company* v. *Harris*, 574.
14. But held so to operate, the record showing that a decree dissolving an injunction was made on the 6th of February, a petition for the suspension of the order filed by one party on the same day, by another on the 15th, a petition to open the decree on the 18th; a motion to rescind, made on the 6th March, during the term at which the decree was rendered, which motion was heard and denied on the 13th, with an appeal

PRACTICE (*continued*).

prayed in open court on the 20th, and an appeal bond filed on the 23d. *Railroad Company* v. *Bradleys*, 575.

(d) *In prize.* See *Information.*

15. A case heard on further proofs, though the transcript disclosed no order for such proofs, it having been plain, from both parties having joined in taking them, that either there was such an order, or that the proofs were taken by consent. *The Georgia*, 32.

II. In Circuit and District Courts.

(a) *In cases generally.*

16. A court of the United States has power to adopt in a particular case a rule of practice under a State statute; and where a Circuit Court is possessed of a case from another circuit, under the act of February 28, 1839, § 8 (5 Stat. at Large, 322), it may adopt the practice of the State in which the Circuit Court from which the case is transferred, sits, as fully as could the Circuit Court which had possession of the case originally. *Supervisors* v. *Rogers*, 175.

17. When contracts, made payable in coin, are sued upon, judgment may be entered for coined dollars and parts of dollars. *Bronson* v. *Rodes*, 229; *Butler* v. *Horwitz*, 258.

(b) *In equity.*

18. In cases where relief is sought on the ground that a patent for lands was issued to one person, while the right was in another, the decree should not annul or set aside the patent, but should provide for transferring the title to the person equitably entitled to it. *Silver* v. *Ladd*, 219.

(c) *In patent cases.*

19. A patentee, claiming under a reissued patent, cannot recover damages for infringements committed antecedently to the date of his reissue. *Agawam Company* v. *Jordan*, 583.

PRECEDENT. See *Authority.*

PUBLIC LANDS. See *California; Land Office; Meander Lines; Practice*, 18; *Riparian Owners.*

1. The fourth section of the act of Congress of 27th September, 1850, granting, by way of donation, lands in Oregon Territory to "*every* white *settler or occupant*, ... American half-breed Indians included," embraced, by a benignant construction within the term single *man*, an unmarried woman. *Silver* v. *Ladd*, 219.

2. The fact that the labor of cultivating the land required by the act was not done by the manual labor of the settler is unimportant, if it was done by her servant, or friends, for her benefit and under her claim. *Ib.*

3. Residence in a house divided by a quarter-section line, enables the occupant to claim either quarter in which he may have made the necessary cultivation. *Ib.*

PUBLIC LAW. See *Public Policy.*

1. A *bonâ fide* purchase for a commercial purpose by a neutral, in his own

PUBLIC LAW (*continued*).

home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent. *The Georgia*, 32.

2. To justify a vessel of a neutral in attempting to enter a blockaded port, she must be in such distress as to render her entry a matter of absolute and uncontrollable *necessity*. *The Diana*, 354.

PUBLIC POLICY.

1. A contract made by a consul of a neutral power, with the citizen of a belligerent State, that he will "protect," with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void. *Coppell* v. *Hall*, 542.
2. Where suit is brought upon such a contract, a party who pleads its invalidity does not render the plea ineffective by a further defence in "reconvention;" a defence of this sort, to wit, that, if the contract be valid, he himself takes the position of a plaintiff, and makes a claim for damages for its non-performance. *Ib.*

RATIFICATION. See *Municipal Bonds.*

REBELLION, THE. See *Interest.*

General orders of the officer of the United States, commanding in the department, gave no validity to commercial intercourse during it, between places within the lines of military occupation by forces of the United States, and places under the control of insurgents. *Coppell* v. *Hall*, 452.

RECEIPT OF MONEY. See *Estoppel.*

REGISTRY AND RECORDING ACTS. See *Ships and Shipping.*

RES JUDICATA.

1. The plea of, applies to every objection urged in a second suit, when the objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it. *Sheets* v. *Selden*, 416.
2. Thus a judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on a question of the validity of the issue on a suit brought by the same creditor against the same town, on other bonds, another part of the same issue; the parties being identical, and all objections taken by the town in the second suit having been open to be taken by it in the former one. *Beloit* v. *Morgan*, 619.
3. So where, under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in Indiana (in which State a judgment in ejectment has the same conclusiveness as common law judgments in other cases), for recovery of his estate, as forfeited, and a verdict is found for him, and judgment given accordingly, the tenant cannot, in another proceeding, deny the validity of the lease, nor his possession,

RES JUDICATA (*continued*).

nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid. *Sheets* v. *Selden*, 416.

4. A decree, absolute in terms, dismissing a bill is a bar to further litigation on the same subject between the same parties, unless the decree be made on some ground which does not go to merits. *Durant* v. *Essex Company*, 107.

RIPARIAN OWNERS.

1. A grant of a fractional part of public lands in Minnesota, on the Mississippi, embracing 9.28 acres, held to include as within the meander lines a piece of 2.78 acres, which at low water was separated by a slough 28 feet wide, but accessible from the main land; and at high water was submerged. *Railroad Company* v. *Schurmeir*, 272.
2. How far the common law rules of *medium filum* apply under statutes relating to the survey and sale of public lands bordering on rivers. *Ib.*

SECRETARY OF THE INTERIOR. See *Heads of Departments; Land Office.*

SECRETARY OF THE TREASURY. See *Court of Claims; Customs of the United States; Heads of Departments; Internal Revenue.*

The power intrusted by the act of Congress of March 3, 1797, and that of June 3, 1864, as amended in its 179th section by the act of March 3, 1865, to the Secretary of the Treasury to remit penalties, is one for the exercise of his discretion in a matter intrusted to him alone, and admits of no appeal to any court. *Dorsheimer* v. *United States*, 166.

SECRETARY OF WAR. See *Heads of Departments.*

SETTLEMENT. See *Estoppel.*

SHIPS AND SHIPPING. See *Charter-Party; Public Law.*

1. Under the act of Congress of July 29th, 1850, enacting, "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs where such vessel is registered or enrolled," a recording of a mortgage in the office of the collector of the home port of the vessel has the effect, by its own force and irrespective of any formalities required by a State statute to give effect to chattel mortgages, to give the mortgagee a preference over a subsequent purchaser or mortgagee. *White's Bank* v. *Smith*, 646.
2. The home port of the vessel is the port in the office of whose collector the bill of sale, mortgage, &c., should be recorded; not the port of last registry or enrolment when not such home port. *Ib.*
3. The act is constitutional. *Ib.*

SOVEREIGNTY. See *Heads of Departments; Interest.*

Although, for reasons of public policy, a claim for damages against a ves-

SOVEREIGNTY (*continued*).

sel of the United States guilty of a maritime tort, cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The government, in such a case, stands, with reference to the rights of the defendants or claimants, as do private suitors, except that it is exempt from costs, and from affirmative relief against it, beyond the demand or property in controversy. *The Siren*, 152.

STATE. See *Constitutional Law*, 2; *Texas*.

STATUTES. See (for the construction of statutes, either State or Federal, involving questions upon, or touching in some way these heads) *Alabama; Arbitrament and Award; Collector; Collision; Conflict of Jurisdiction*, 1, 2, 3, 5, 6; *Constitutional Law*, 4; *Contract*, 4; *Customs of the United States; District of Columbia; Evidence*, 4; *Illinois; Information*, 4; *Informer; Inspection; Internal Revenue; Iowa; Jurisdiction; Land Office; Louisiana; Mail, The United States; "Meander Lines;" Minnesota; Municipal Bonds; Naturalization; Patent*, 1, 8; *Practice*, 13, 14, 16; *Public Lands; Rebellion, The; Riparian Owners; Secretary of the Treasury; Ships and Shipping; Tender*, 1, 2, 3; *Texas; Wisconsin*.

1. A benevolent statute of the government, made for the benefit of its own citizens, and inviting and encouraging them to settle on its distant public lands, will be liberally construed, especially if aided by the context. *Silver* v. *Ladd*, 219.
2. An enactment in a State law, that the collecting agents of the counties shall pay over to the State treasurer, "in coin," the full amount of the taxes, requires by legitimate, if not necessary consequence, that the taxes named be *collected* in coin. *Lane County* v. *Oregon*, 71.
3. The notes of the United States, issued under the Loan and Currency Acts of 1862 and 1863, are engagements to pay dollars; and the dollars intended are coined dollars of the United States. *Bank* v. *Supervisors*, 26.

TAXATION. See *Wisconsin*.

TENDER. See *Agent; Statutes*, 2, 3.

1. The clauses in the several acts of Congress of 1862 and 1863, making United States notes a legal tender for debts, have no reference to taxes imposed by State authority. *Lane County* v. *Oregon*, 71.
2. Nor to a bond, given in December, 1851, for payment of a certain sum in gold and silver coin, lawful money of the United States, with interest also in coin, at a rate specified, until repayment. *Bronson* v. *Rodes*, 229.
3. Nor to any contract where it appears to have been the clear intent of the parties that payment or satisfaction should be made in coin. *Butler* v. *Horwitz*, 258.
4. The doctrine that bank bills are a good tender, unless objected to at

TENDER (*continued*).

the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. *Ward* v. *Smith*, 447.

5. The "dollars" which the United States promise, by the notes issued under Loan and Currency Acts of 1862 and 1868, are coined dollars of the United States. *Bank* v. *Supervisors*, 26.

TEXAS.

1. The ordinance of secession of the State of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null and utterly without operation in law. Texas continued to be a State of the Union, notwithstanding all her acts of rebellion, and notwithstanding that she was still without Representatives in Congress; and under the reconstruction acts was under military government of the United States. *Texas* v. *White*, 700.
2. Purchasers of bonds of the United States, issued payable to that State or *bearer*, alienated during rebellion by the insurgent government, and acquired after the date at which the bonds became redeemable, are affected with notice of defect of title in the seller. *Ib.*

UNITED STATES. See *Sovereignty*.

USURY.

It will not be presumed that a note dated on one day for a sum payable with interest from a day previous, was for money first lent on the day of the date. *Ewing* v. *Howard*, 499.

WISCONSIN.

A provision in a statute of, under which a town issued its bonds to a railroad, that a tax requisite to pay the interest on these bonds should be levied *by the supervisors* of the town, is not exclusive of a right in *the town clerk* to levy the tax under a general statute making it his duty to lay a tax to pay all debts of the town; a mandamus having issued under the first act, but after efforts to make it productive, having produced nothing. *Morgan* v. *Town Clerk*, 610.

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